Access to Constitutional Courts: Popular Complaints in Croatia, Slovenia and Macedonia

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Preface

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Introduction

After socialist rule came to an end in the 1990s the Successor States of the former Socialist Federal Republic of Yugoslavia (SFRY) adopted new constitutions based on the rule of law, constitutional supremacy and democratic rule. Ever since they have gone or are still going through profound economic, political and legal changes. After having achieved independence it has, to this day, been the main topic on the political agendas of the Successor States to achieve a speedy integration into the European Union. Besides economic transformations, this presents them with the challenge of comprehensive reforms implementing the principles of liberty, democracy and the respect for human rights.

The new constitutions and the therein prescribed principles and rules, human rights and liberties of individuals constitute formal and substantive limits to the state authorities and bodies vested with state power. A strong constitutional adjudication and the broad accessibility to the constitutional courts play a fundamental role for the enforcement of these guarantees and the consolidation of the constitutions in the Successor States. The constitutional courts are vested with comprehensive powers to monitor acts and actions of the state authorities with respect to their compatibility with the constitutions. So as to enforce the constitutional order they are empowered to invalidate state acts for being inconsistent with the latter. These review powers comprise acts of an individual and concrete nature adopted by the judicial and executive powers as well as laws and other acts of legislation.

The broad accessibility of the constitutional courts of the Successor States has been accomplished by several means which entitle individual persons to request the constitutional courts to review state acts with respect to their compatibility with the constitutions. The most noteworthy of these access rights is the entitlement of natural and legal persons to file complaints against laws and other acts of legislation without having to demonstrate a legal interest. With the exception of Bosnia and Herzegovina and the Republic of Kosovo, whose constitutions are to a great extent influenced by the Western model, all other Successor States provide for popular complaints as means of individual access to their constitutional courts.

Due to their particular nature such popular complaints fundamentally differ from other legal remedies in public and constitutional law proceedings. Because they can be filed without a personal concern and legal interest, popular complaints allow practically unrestricted individual access to constitutional courts. As remedies for the initiation of judicial review proceedings they serve the enforcement of the abstract constitutional order against the legislative authorities. As individual access rights they, at the same time, entail features of legal remedies for the protection of subjective rights.

Because unlimited access of individuals to constitutional courts predominantly faces resistance, popular complaints are rather uncommon in a European perspective. They can be found only in single states or at the subnational level. Also the European Commission of Democracy through Law (generally known as Venice Commission) regularly advises against introducing popular complaints.[1]

The practically unlimited access of individuals to the constitutional courts in the Successor States of the SFRY raises the question as to the actual function and significance of popular complaints as individual access rights.

Detailed studies on access of individuals to constitutional courts are rare. In light of that the Venice Commission commissioned the publication of two significant studies providing a comprehensive overview over the different means of individual access in the member states of the European Council: «Der Zugang des Einzelnen zur Verfassungsgerichtsbarkeit im Europäischen Raum»[2] and «Study on Individual Access to Constitutional Courts»[3]. Numerous studies can be found with respect to the individual or constitutional complaint as classic remedy for human rights protection and as most spread means of direct individual access to constitutional courts. Detailed studies exist for instance in relation to the German *Verfassungsbeschwerde* but also in the individual Successor States considered. In contrast hereto, there seem to be

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1 The Venice Commission is the Council of Europe's advisory body on constitutional matters. Established in 1990, the Commission has contributed to a significant extent to the adoption of European constitutional standards in the fields of democracy, human rights and the rule of law in the Successor States of the former SFRY and all post-communist and -socialist states after transition. For more information see <www.venice.coe.int/WebForms/pages/?p=01_Presentation&lang=EN> (last accessed September 2018).

2 Venice Commission Document CDL-JU(2001)22.

3 Venice Commission Document CDL-AD(2010)039rev.

hardly any in-depth studies on popular complaints as access rights of individuals to constitutional courts. A reason for this could be the fact that, with a few exceptions on the national and subnational level, these access rights are rather uncommon in European systems. The Bavarian popular complaint, for example, is analyzed in a number of doctoral theses and the meanwhile abolished popular complaint in Hungary has been subject of a couple of academic publications as well.

To the knowledge of the author there are, however, no detailed procedural or comparative studies about the popular complaints in the Successor States of the former SFRY. Also in domestic legal doctrine these means of direct individual access find attention mostly in a general way in relation to the initiation of judicial review proceedings or to the heavy workload of the constitutional courts.

The present study aims at providing an answer to the above raised question about the function and significance of popular complaints in a procedural and practical aspect. Besides, the overall research question relates to the actual institutional significance of these complaints for the enforcement of the constitutional orders and for the consolidation of the new constitutions in the Successor States. In this respect the popular complaints in the Republics of Croatia, Slovenia and Macedonia are examined in a comparative manner. In accordance with their procedural arrangements these three complaints represent three different models which developed in the Successor States after transition. With respect to the procedural requirements the popular complaint in Slovenia stands for the most restricted form. The Croatian complaint is assessed in place of the popular complaints provided in Serbia and Montenegro, because of the comparability of the respective procedural arrangements. The choice of the popular complaint as provided in Macedonia as third model is finally justified by the limited protection offered by the constitutional complaint, allowing direct access to the constitutional court in parallel with the popular complaint.

In Chapter 1 the bases for the study on the popular complaints in Croatia, Slovenia and Macedonia are laid. In order to narrow down and to classify the object of investigation, the study in a first step describes the types and function of access rights of individuals in general and the popular complaints for the initiation of judicial review proceedings in particular. By comparison to constitutional complaints, special focus will be laid on the analysis of the protective function of popular complaints. To show the origin of the popular complaints in Croatia, Slovenia and Macedonia, a historical review will be given

with regard to the function of the popular complaint under the political ideology of socialist rule.

In order to provide a basis for the assessment of the institutional role and significance of the popular complaints under current law, Chapter 2 presents the Constitutional Courts of Croatia, Slovenia and Macedonia from an institutional aspect. Essential are especially the comprehensive powers of the Courts and the access systems, which allow their broad accessibility to so-called authorized applicants and to individuals.

Chapter 3 provides a detailed analysis of the three popular complaints considered from a procedural point of view by investigating the relevant constitutional and legal bases and the pertinent case-law of the Constitutional Courts. Two relevant aspects with respect to the procedural arrangements of these remedies are investigated in this part of the study: the procedural requirements for the submittal of popular complaints and the procedural rights of applicants in judicial review proceedings and procedural measures allowing concrete improvements of their personal legal positions. The comparative conclusion reveals existing similarities and differences between these three popular complaints.

In Chapter 4 the study assesses the relevance of the popular complaints in Croatia, Slovenia and Macedonia in a practical aspect, taking into account the available statistical data on the activity of the Courts from 2002 up to and including the year 2015. This data reveals the practical significance of popular complaints in quantitative and in qualitative terms. On the one hand, these complaints are analyzed in relation to the broad circle of authorized applicants. Thereafter, their practical significance is established from the perspective of individuals who are also entitled to directly access the Constitutional Courts by filing constitutional complaints. In a second part the impact of popular complaints on the enforcement of the Constitutions in the three states considered is analyzed on the basis of the comprehensive case-law of the three Courts over the twenty-five years since transition. In this part of the study the comparative conclusion shows furthermore whether the procedural differences of the three complaints have an impact on their practical significance.

In Chapter 5 all previous aspects and findings are combined in order to draw conclusions on the role of these complaints and their institutional significance for the enforcement of the Constitutions and human rights in the three states considered. At this point, the relevant current political and legal circumstances are taken into consideration. Thereafter, a brief look will be taken on previous

and current attempts to restrict individual access by means of the popular complaints. This allows giving an outlook on the future of these remedies in the three states considered.

The main outcomes and findings of the study will be summarized in the Concluding Observations. These finally provide an answer to the over-all research question mentioned above: whether the popular complaints as a means of individual access to the Constitutional Courts must be regarded to be of an important institutional significance in Croatia, Slovenia and Macedonia.

Zurich, October 2018 ANA THOONEN-TORNIC

Table of Contents

List of Abbreviations

This list only contains abbreviations used in the present study and not the commonly known abbreviations.

art.	article(s)
cit.	cited
CCA	Zakon o Ustavnem sodišču (Constitutional Court Act of the Republic of Slovenia)
CCL	Ustavni zakon o Ustavnom sudu Republike Hrvatske (Constitutional Law on the Constitutional Court of the Republic of Croatia)
Cst.	Constitution
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) as amended by Protocol no. 14 on 1 June 2010
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
ed., eds.	editor(s)
edn	edition
esp.	especially
EVA	Evidence vladnega akta (Uniform code for the identification of acts passed by the government and governmental bodies in the Republic of Slovenia)
f., ff.	following
fn.	Footnote
HAZU	Hrvatska Akademija Znanosti i Umjetnosti (Croatian Academy of Sciences and Arts)
ibid.	ibidem (lat.) the same
i.e.	id est (lat.) this means
IHS	Izviješća Hrvatskog Sabora (Report of the Croatian Sabor)
JOR	Jahrbuch für Ostrecht

n., nn.	note(s)
NJW	Neue Juristische Wochenschrift
NN	Narodne Novine (Official Gazette of the Republic of Croatia)
no., nos.	number(s)
OdlUS	Odločbe Ustavnega sodišča Republike Slovenije (Compendium of decisions and rulings of the Constitutional Court of the Republic of Slovenia)
OER	Osteuropa Recht
p., pp.	page(s)
para., paras.	paragraph(s)
PFZ	Pravni Fakultet Zagreb (Law Faculty of Zagreb)
RoP	Rules of Procedure
SFRJ, SFRY	Socialist Federal Republic of Yugoslavia
SKJ	Savez Komunista Jugoslavije (League of Communists of Yugoslavia)
SR	Socialist Republic
VVDStRL	Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZöR	Zeitschrift für öffentliches Recht

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Chapter 1: Access by filing popular complaints

I. Access of individuals to constitutional courts

The competence to open and to conduct judicial proceedings at one's own discretion is principally foreign to the judiciary. As courts can only initiate procedures upon valid applications filed by authorized applicants, their accessibility is a necessary condition for performing their judicial tasks. The same applies to systems of constitutional adjudication.[1] As a rule, the responsible courts review the compatibility of state acts with the constitutions only upon and within the scope of requests of authorized applicants. From the perspective of the courts their accessibility is a precondition for their power to enforce the constitutions against unconstitutional state acts. For authorized applicants the entitlement to access judicial proceedings is a means to subject certain state acts to constitutional review. The restriction of the review activities to the scope of requests is a method to limit the powers of the constitutional courts. It moreover constitutes a precondition for their self-restraint in reviewing acts enacted by the legislative powers.[2]

In Europe the tradition of individual access to constitutional adjudication can be traced back to the 19th century. While the German Constitution of 1849 – even though it never entered into force – provided for such access, the Swiss Federal Constitution of 1874 introduced a legal remedy that entitled individuals to appeal to the Federal Court against state acts or cantonal laws and regulations which violated their rights and liberties (*staatsrechtliche Beschwerde*).[3] In the German Bundesland Bavaria means of individual access were introduced in 1919.

The horrifying experiences with the two World Wars increased human rights consciousness and the awareness of the necessity of adequate remedies to prevent and to sanction governmental arbitrariness and disregard of the fundamental rights. Concurrently with the establishment of constitutional courts the

1 BÖCKENFÖRDE, 11; BRUNNER, Zugang des Einzelnen, 233.
2 See for many HÄBERLE, 12 f.; SADURSKI, 109 ff.
3 Art. 113 para. 1 n. 3 Federal Constitution of 1874.

post-war period in Europe is characterized by their opening to individual persons and the spread of individual access rights to constitutional adjudication.[4] Playing the leading role, the German Federal Republic introduced the constitutional complaint in 1951.[5] The German model was adopted by the Socialist Federal Republic of Yugoslavia (SFRY) in 1963 and thereafter spread throughout most of post-war Europe. With the exception of the Netherlands, today all European states with constitutional courts or tribunals provide for at the least one means of individual access. Finally, in France the right of individuals to access the *Conseil Constitutionnel* was introduced with the constitutional revision in 2008[6] while Turkey introduced the constitutional complaint with the comprehensive constitutional reform adopted in 2010.[7]

1. Definition

Following the judicature of the European Court of Human Rights (ECtHR) in civil and in criminal law matters, individual access to courts can be generally defined as entitlement of individual persons to bring violations of their rights before a court by commencing an action and with the purpose of having the rights concerned determined by that court.[8] In accordance with its practice, individual access in civil and in criminal law matters constitutes an autonomous and indispensable component of the right to court as guaranteed by art. 6 para. 1 ECHR[9] and is closely related with the realization of the rule of law.[10] In the understanding of the ECtHR, individual access is conditional upon a legitimate interest in the proceedings and therefore requires a direct concern of the applicant.

4 HARUTYUNYAN/NUSSBERGER/PACZOLAY, n. 47.

5 Initially provided only by art. 90 ff. Constitutional Court Law of 1951, the complaint was included into art. 93 para. 1 n. 4a Basic Law of 1949 only in 1969. Detailed studies of the German *Verfassungsbeschwerde* are provided by KLUTH, 53 ff.; KORINEK, passim; SEIBERT, passim; ZUCK, passim.

6 Art. 61 para. 1 Constitution of 1958. For more details see FABBRINI, 1302 ff.

7 Art. 148 Constitution of 1995 and art. 45 para. 1 Constitutional Court Law of 2011.

8 Judgment *Golder vs. UK*, 4451/70, A 18 (1975), §§ 26 and 32.

9 Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 as amended by Protocol no. 14 on 1 June 2010.

10 *Golder vs. UK,* §§ 34, 35 and 36. For more references to the pertinent jurisdiction see WIEDERIN, 310 ff.

In the present study individual access is understood as the right of individual persons to file complaints or initiatives to constitutional courts.[11] As constitutional courts the study refers to particular judicial institutions such as courts, tribunals or councils which are placed outside the ordinary court system and have exclusive jurisdiction to review normative acts and other specific acts or actions of state authorities or bodies vested with state powers with respect to their compatibility with the constitution.[12] The circle of state acts and actions that can be subject to such appeals depends on the review powers of the constitutional courts and on the specific procedural requirements, which might or might not prescribe a direct concern of applicants. Accordingly, individual access can be granted against acts and actions of state bodies that are addressed directly to individuals and determine their legal position and rights, against omissions of state bodies to act or against laws and other normative acts of a general nature. The accessibility of constitutional courts to individuals entails the right of individual persons to request the initiation of proceedings in which these state acts are reviewed as to their compatibility with the constitution and eliminated for violating the constitutional rules or principles.

Individual access can be granted by means of legal remedies such as complaints or requests that oblige a constitutional court to open review proceedings. Access can also be granted in form of a right to suggest or petition the initiation of proceedings while leaving the final decision to the discretion of the court. The present study only considers remedies with binding effect as individual access rights. This applies to binding requests and complaints but also to suggestions or petitions which have a procedural effect because they oblige the court to justify their rejection.[13]

As constituent elements of a constitutional system, remedies and means that allow individuals to access constitutional courts have their basis in constitutions or constitutional laws.[14] This constitutional nature mirrors their supreme institutional significance in contrast to rights of appeal to the ordinary or administrative judiciary that are merely guaranteed by law. Nevertheless, there is no uniform view as to whether the access to constitutional courts is to be

11 See as well BRUNNER, Zugang des Einzelnen, 191 f.; HARUTYUNYAN/NUSSBERGER/PACZOLAY, n. 21.

12 The different systems of judicial review will be described on pp. 17 ff.

13 Compare BRUNNER, Zugang des Einzelnen, 217, who only considers remedies as access rights which automatically trigger proceedings or oblige the courts to initiate them.

14 E.g. GROTE, fn. 201.

considered as constitutional right. While PFERSMANN, for instance, acknowledges these access rights as fundamental rights,[15] the Constitutional Court of Slovenia rejects their nature as a constitutional right.[16]

2. Typology of individual access rights

The means allowing individual access to constitutional adjudication can be divided into two groups; those allowing indirect individual access (A) and those enabling individuals to directly access constitutional courts (B and C). The typology of the present study adopts the classification applied by the Venice Commission.[17]

A. Indirect individual access

Indirect individual access is granted by remedies which allow individuals to challenge the constitutionality of state acts through the action of so-called «intermediary bodies».[18] Appeals are filed to an intermediary body that requests the constitutional court to open proceedings. Typically, such intermediary bodies are state organs or public institutions such as ordinary courts, public prosecutors or the ombudspersons.[19] In accordance with the definition above, an appeal is regarded as indirect individual access right only if an intermediary body is obliged to refer the issue to the constitutional court or to justify the rejection in a formal ruling.

Indirect individual access constitutes a widespread mechanism for the protection of human rights. Two prevalent forms of indirect individual access to constitutional courts will be described in the following.

a) Objections of unconstitutionality

In systems of concentrated constitutional adjudication[20] ordinary courts, that have doubts on the constitutionality of a legal provision they have to apply in a concrete case, halt the proceedings and refer to the constitutional court by

15 PFERSMANN, Prolégomène, 77.
16 Ruling U-I-71/1994 of 6 October 1994, OdlUS III, 109.
17 See HARUTYUNYAN/NUSSBERGER/PACZOLAY, nn. 54, 56 ff.
18 HARUTYUNYAN/NUSSBERGER/PACZOLAY, n. 21.
19 HARUTYUNYAN/NUSSBERGER/PACZOLAY, nn. 56 ff., 63 ff., 72 f.
20 See below pp. 19 f.

preliminary requests. The latter reviews the respective provision as to its compatibility with the constitution. On the other hand, also participants to court proceedings can draw attention to inconsistencies of applicable normative provisions by raising so-called objections or exceptions of unconstitutionality.[21] The ordinary courts, which are requested to refer the question of constitutionality to the constitutional court, function as intermediary bodies for the applying participant.

While such objections are normally not binding for the ordinary courts[22] they have a binding nature in a few states. In Romania, for instance, a plea of a party obligates a judge to halt the proceedings and to submit a preliminary request to the constitutional court.[23] In Italy and since 2008 in France, on the other hand, the *eccezione di costituzionalità* or *questione di legittimità costituzionale* and the *question préjudicielle de constitutionalité* oblige the judges to assess and to justify refusals to request the initiation of review proceedings before the constitutional courts.[24]

b) Indirect access through ombudspersons

Another common form of indirect access is the right to request the ombudsperson as intermediary body to bring state acts that interfere with human rights before the constitutional court.[25] National ombudsperson offices can be found in almost all contemporary constitutional systems. With the breakdown of the totalitarian and authoritarian regimes, ombudspersons became inseparably linked with the rule of law, democracy and the protection of the ECHR.[26] In Eastern European states they were introduced as advocates of people's rights and liberties and are commonly referred to as human rights defenders or as people's attorney.[27]

Only in a number of states including Austria, Liechtenstein and Portugal the ombudspersons are vested with the competence to access constitutional judiciary.[28] Generally, ombudspersons are authorized to this effect if they establish

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21 HARUTYUNYAN/NUSSBERGER/PACZOLAY, n. 58.

22 BRUNNER, Zugang des Einzelnen, 217; HARUTYUNYAN/NUSSBERGER/PACZOLAY, n. 57.

23 See BRUNNER, Festschrift Stern, 1055. Similar institutions can be found in Serbia and Montenegro.

24 For further examples see HARUTYUNYAN/NUSSBERGER/PACZOLAY, n. 58.

25 HARUTYUNYAN/NUSSBERGER/PACZOLAY, nn. 64 ff.

26 ARNOLD, ZöR 2006, 9; KUCSKO-STADLMAYER, 2 f.

27 ARNOLD, ZöR 2006, 9; BRUNNER, ZaöRV 1993, 845 f.

28 Detailed in HARUTYUNYAN/NUSSBERGER/PACZOLAY, nn. 63 ff., 106.

violations in concrete legal cases they are dealing with. Their contribution to human rights protection can be compensatory or supplementary.[29] The authority to request the initiation of proceedings for the benefit of an individual applicant has a compensatory protective effect if the latter is not entitled to access the constitutional court. If individuals are entitled to file complaints themselves, requests of ombudspersons in the name of an applicant can be acknowledged as supplementary protection. Less widespread is the entitlement of ombudspersons to refer to the constitutional courts with regard to laws and other normative acts that affect human rights and liberties.[30]

B. Direct individual access

Direct individual access is granted if individual persons are entitled to directly appeal to the constitutional courts and to request the initiation of review proceedings without having to involve an intermediary party.[31] Direct access to constitutional courts can be granted against a variety of state acts comprising acts and actions of state bodies or their failure to act as well as against laws and other normative acts.

Besides electoral complaints (a), constitutional complaints as most common form of direct individual access in Europe will be presented in the following, based on the German model as prototype (b). The actual function of constitutional complaints and popular complaints as further remedies allowing direct individual access to constitutional courts will be analyzed in more detail by way of comparison in the following paragraphs (II and III).

a) Electoral complaints

In a number of states, where the constitutional courts are empowered to assess the compliance of popular votes and elections, of referendum questions or of related decisions with the constitutional and legal standards, individuals are granted direct access by means of electoral complaints.[32] In Germany eligible citizens are entitled to file complaints against decisions on the validity of elections of the legislative bodies.[33] The Hungarian Constitutional Court, as other

29 HARUTYUNYAN/NUSSBERGER/PACZOLAY, n. 64.
30 HARUTYUNYAN/NUSSBERGER/PACZOLAY, n. 67.
31 HARUTYUNYAN/NUSSBERGER/PACZOLAY, n. 21.
32 BRUNNER, ZaöRV 1993, 865.
33 Art. 41 para. 2 Basic Law of 1949 and § 48 Constitutional Court Law of 1951.

example, reviews parliamentary resolutions ordering or dismissing a referendum upon petitions that can be filed by anybody.[34]

b) Constitutional complaints

aa) Definition and main characteristics

Constitutional or individual complaints[35] or «fundamental rights complaints»[36] can be defined as procedural instruments that entitle individuals to challenge acts and activities of state organs or bodies vested with state powers before the constitutional courts for violating their constitutional rights. By submitting a complaint, an individual person activates a special procedure in which the court assesses the contested state act. If it finds that the allegations of violation are justified, it eliminates the contested state act and returns the case to the responsible authority for reconsideration. Constitutional complaints can be considered as classic and most common legal remedies for the protection of human rights and liberties. They offer an additional protection to the protection of constitutional rights and liberties by the ordinary courts.

The scope of rights, whose protection can be achieved by means of constitutional complaints, varies from state to state. The scope can be either predefined by an explicit reference by the constitution as is the case in Germany[37] and Spain[38] or restricted to specific constitutional rights and liberties as in Albania, where complaints can be filed only for the protection of the right to due process of law.[39] In Austria, the general reference to constitutional rights and liberties leaves a margin of discretion to the Constitutional Court.[40]

Despite the procedural differences on a country to country base, the distinctive element for constitutional complaints is their strictly personal nature.[41] Complaints are only admissible if applicants demonstrate an own legal interest in

34 Section 33 para 1 Constitutional Court Law of 2011.
35 HARUTYUNYAN/NUSSBERGER/PACZOLAY, n. 54.
36 BRUNNER, Zugang des Einzelnen, 206.
37 Art. 93 para. 1 n. 4a Basic Law of 1949.
38 Art. 53 para. 2 Constitution of 1978.
39 Art. 131 lit. f Constitution of 1998.
40 Art. 144 Constitution of 1945.
41 BRUNNER, Zugang des Einzelnen, 6. For a detailed analysis in relation to the German constitutional complaint see EPPING, n. 162, nn. 173 ff.; VON PACZENSKY, 36 f.

bringing proceedings before the constitutional courts. Legal interest as an access requirement in general and as requirement for filing constitutional complaints in particular will be analysed more thoroughly further below.[42]

As a consequence of legal interest as admissibility requirement, constitutional complaints can be defined as legal remedies against state acts which directly interfere with the complainants' rights and liberties. This applies to acts passed in application of laws and which based thereon regulate the rights and obligations of specific or a determinable circle of persons (so-called «individual acts»).[43] In Spain for instance complaints can be filed against court judgments or decisions[44] while in the Czech Republic also individual acts or actions of administrative authorities can be appealed against before the constitutional court.[45] Exceptionally, constitutional complaints can also be filed against laws and other acts of legislation. In Germany, for instance, they can be filed against laws, if their application leads to violations of rights and liberties of individuals.[46] In Austria constitutional complaints can be filed against laws and regulations that directly interfere with the applicants' rights and liberties.[47] This kind of constitutional complaint has recently been introduced in Hungary as well.[48]

bb) Extraordinary nature

Constitutional complaints are extraordinary remedies. This is due to the institutional separation of constitutional adjudication from the judiciary.[49] The first feature of this extraordinary character is their subsidiary nature as remedy against human rights violations. Constitutional courts can only be referred to at last instances if the judiciary fails to provide sufficient protection of the constitutional rights and liberties. Before appealing to the constitutional court, complainants must have sought protection before the administrative and judicial instances by exhausting all available legal remedies.[50]

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42 See below pp. 12 f.
43 E.g. HARUTYUNYAN/NUSSBERGER/PACZOLAY, nn. 79 and 95.
44 Art. 53 para. 2 Constitution of 1978.
45 Art. 87 para. 1 lit. d Constitution of 1993.
46 Art. 90 para. 1 Constitutional Court Law of 1951.
47 Art. 139 para. 1 Constitution of 1945.
48 Art. 26 para. 2 lit. a Constitutional Court Law of 2011.
49 ZUCK, n. 24.
50 ARNOLD, ZöR 2006, 14; EPPING, n. 179; SEIBERT, 493 f., 502; ZUCK, nn. 34 ff.

The second feature of the extraordinary nature is the lack of a suspensive effect of constitutional complaints. Accordingly, the enforceability of the disputed state acts is not prevented by the submittal of complaints. Finally, the restricted scope of jurisdiction of the constitutional courts can be considered as third feature of the extraordinary nature. The review is principally limited to the assessment of rights violations and excludes the evaluation of facts or of the rightful application of laws in general.[51] Both in new democracies and established constitutional systems, this delimitation from the competences of the judiciary causes difficulties to the constitutional courts.[52]

3. Positive effects for human rights enforcement

Today, most states with a system of concentrated constitutional adjudication entitle individuals to demand judicial protection by the constitutional courts. Numerous European states comprising Albania, Austria, Belgium, the Czech Republic, Germany and Spain introduced both means of indirect access and such which enable individuals to directly access the constitutional courts. Only a few European states, such as Bulgaria, Italy and Lithuania provide for only indirect individual access.[53] The positive effects of granting individuals access to constitutional courts has been acknowledged both with regard to means allowing indirect access and to direct access rights.

The interposition of an intermediary body for applications to constitutional courts entails several positive effects. Firstly, it has a filtering effect and prevents the constitutional courts from being flooded with appeals.[54] The Venice Commission endorses the introduction of indirect access rights for an improved quality of applications and for enhancing the chances of success of applications. In order to keep the access path to judicial protection as short as possible, the Commission recommends that any judge be authorized to refer preliminary questions to the constitutional court.[55] It also endorses the access of ombudspersons in general and their entitlement to request the initiation of review proceedings on behalf of the individuals, as because of their expertise

51 SADURSKI, 7; ZUCK, n. 24.
52 BRUNNER, Zugang des Einzelnen, 214 f.
53 See overview in HARUTYUNYAN/NUSSBERGER/PACZOLAY, table 1.1.1., 61 ff.
54 E.g. RÜLKE, 159.
55 HARUTYUNYAN/NUSSBERGER/PACZOLAY, nn. 61 f.

and professionality their submittals are usually of a better quality and enhance the chances of success.[56]

At the same time however, the protection of the applicant's rights is dependent on the capacity and willingness of the intermediary party to forward the request to the constitutional courts.[57] As indirect access rights do not allow for an autonomous activation of the constitutional courts by the individuals, they are of a smaller significance for human rights protection than means allowing individuals to directly refer to the constitutional courts.

From among the means allowing individuals to directly access the constitutional courts, constitutional complaints are of a fundamental value as legal remedies for the protection of constitutional rights against state authorities. The direct linkage created between the individual person and the constitutional courts as supreme guardians of the constitutions and the constitutional rights significantly strengthens the legal protection against the state authorities. In legal doctrine this remedy is considered to be of an «outstanding importance» for human rights protection[58] and seen as «completion» of the principle of constitutionality.[59] In order to most comprehensively protect human rights and as most efficient way to relief the ECtHR, the Venice Commission endorses the introduction of constitutional complaints that can be filed both against violations by the judiciary and the administration.[60]

Considering the advantages and disadvantages, the Venice Commission recommends a combination of means of direct individual access with indirect access rights.[61] The leverage effect of broad individual access to constitutional adjudication for human rights and liberties is undisputed. The more open constitutional courts, the more intensive is the protection of these rights. Firstly, as additional and subsidiary protective means, individual access rights considerably extend the protection offered by the administrative judiciary against conducts and acts of the state authorities. Furthermore, they contribute to the

56 HARUTYUNYAN/NUSSBERGER/ PACZOLAY, nn. 69 f. See also Opinion on the possible reform of the Ombudsman institution in Kazakhstan, Venice Commission Document CDL-AD(2007)020, n. 14.

57 HARUTYUNYAN/NUSSBERGER/PACZOLAY, n. 3.

58 BRUNNER, Festschrift Stern, 1041.

59 KLUTH, 54 f.

60 HARUTYUNYAN/NUSSBERGER/PACZOLAY, nn. 79 f.

61 HARUTYUNYAN/NUSSBERGER/PACZOLAY, nn. 3, 108.

detection of rights violating state acts and to their elimination from the constitutional order.[62] And finally, individual access entails a strong protective effect for human rights and liberties. Decisions to eliminate rights violating acts not only protect the personal rights of the applicants, but also – due to their finality and general enforceability – at the same time enforce these rights as constitutional guarantees in a general interest.[63] This is why individual access to constitutional adjudication is broadly considered as maximum protection of constitutional rights and liberties[64] and as most efficient measure to prevent an overburdening of the ECtHR.[65]

Therefore, it can be concluded that states who offer broad individual access to constitutional courts strive for a comprehensive and strong protection of human rights.

4. Restrictions of individual access

Despite the values of granting individual persons access to constitutional courts, their accessibility also entails serious adverse effects. Being flooded with inadmissible, unsubstantiated or abusive requests, several constitutional courts suffer from a work overload and from an ever growing backlog of pending cases. This not only harms their functionality and authority, but also entails serious negative impacts on an effective rights protection and on the duration of the proceedings.[66] Today, many states and particularly the new democracies in Eastern Europe experience difficulties in finding an equilibrium between an improved protection of constitutional rights and the prevention of their constitutional courts from being flooded.[67]

In practice different organizational measures are taken to enhance efficiency of courts in handling the amount of submittals. This comprises for instance the engagement of chambers or panels of judges with different cases or tasks, the introduction of accelerated or summary proceedings or the joinder of similar applications.[68]

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62 STONE SWEET, 141.

63 HARUTYUNYAN/NUSSBERGER/PACZOLAY, n. 53.

64 E.g. BRUNNER, Zugang des Einzelnen, 202 f.; MARKOVIĆ, 62.

65 HARUTYUNYAN/NUSSBERGER/PACZOLAY, n. 109.

66 BRUNNER, Zugang des Einzelnen, 214; HARUTYUNYAN/MAVČIČ, chapter V.A.

67 GROTE, 58.

68 FAVOREU, 55. See also HARUTYUNYAN/NUSSBERGER/PACZOLAY, n. 11.

In order to decrease the number of submittals, their admissibility is additionally restricted by different procedural requirements for opening proceedings. These requirements or «filters»[69] will be described in the following. So as to provide a base for the subsequent analysis of the popular complaints in Croatia, Slovenia and Macedonia from a procedural point of view, the following illustration only covers those requirements which are relevant as hurdles for individual access to constitutional courts.

A. Legitimate interest in bringing proceedings

Besides the capacity to act as generally valid criterion for legal acts and for individual access to courts, individual access to constitutional courts can be restricted to applicants with a proven individual interest in bringing proceedings before the constitutional courts.

As a general principle of modern legal orders, the existence of a proven legal interest in bringing proceedings is a fundamental prerequisite for judicial protection on the national level and for individual access to international tribunals or courts.[70] According to a statement of the ECtHR issued in its first decision after the introduction of a legitimate interest as new admissibility criterion for individual complaints by Protocol no. 14 on 1 June 2010, the restriction of individual access to persons with a proven legal interest realizes the principle *de minimis non curat praetor* and is a measure of procedural economy.[71]

If a proven legal interest is introduced as access requirement, the right of individuals to access constitutional courts is reserved to persons with a particular grievance and with a legitimate interest in the review and the invalidation of particular state acts. A particular grievance is given if the applicant demonstrates that he or she is affected more than any other person by the state act contested for being unconstitutional.[72]

Essentially, this implies that applicants prove that they are personally, directly and currently affected by the contested state act. They succeed in doing so if they substantiate that state acts or actions or the omission of a state authority

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69 See title II.1. in HARUTYUNYAN/NUSSBERGER/PACZOLAY, n. 110.

70 SLADIČ, 24. For an overview in relation to international tribunals see VAN AAKEN, 21 f., 23, 25 ff.

71 See e.g. decision *Korolev vs. Russia* of 1 July 2010, 25551/05, pp. 3 f. where the ECtHR rejected an individual complaint as inadmissible because the amount in dispute was less than one Euro and therewith of minimal significance for the applicant's legal position.

72 E.g. AUER/MALINVERNI/HOTTELIER vol. 1, n. 2100.

to act directly interferes with their personal rights and legal position. The direct effect must be given without any further implementation by administrative or judicial authorities.[73] This is the case if the contested rule or prohibition is directed to the applicant as addressee. A legal interest moreover requires that alleged rights violations still exist at the moment a complaint is filed. Finally, applicants succeed in demonstrating a legal interest if they substantiate that the final decision by which the constitutional court eliminates the contested state act leads to an effective and not just a hypothetical or theoretical improvement of their personal legal positions.[74]

If introduced in relation to proceedings of constitutional adjudication, legal interest can have two functions.[75] It can serve as mere admissibility requirement for individual access among other procedural requirements to access constitutional courts. Its function can also be farther-reaching and essential for what is called the «procedural legitimacy». The required particular connection to the contested provision and the need for legal protection is required for the capacity of the applicant to be heard in court and for their status as party to the proceedings. This procedural legitimacy or the right to be heard in court is what is referred to as *Prozessführungsbefugnis* in German while in English terminology it is referred to as *standing* or *locus standi*.[76]

Eventually, what is essential for the introduction of legal interest as personal access requirement is that this measure excludes unrestricted individual access by so called *actio popularis* or popular complaints and therewith prevents the constitutional courts from ever-increasing caseloads. For detailed legal descriptions and analyses reference is made to the relevant comprehensive literature.[77]

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73 E.g. HARUTYUNYAN/NUSSBERGER/PACZOLAY, n. 80; SCHENKE, n. 510.

74 EPPING, n. 182.

75 See e.g. SLADIČ, 23 ff., 45 ff.

76 E.g. VAN DIJK, 18, 27.

77 In relation to legal interest in German administrative procedural law see e.g. SCHENKE, nn. 485 ff., 557 ff. With respect to proceedings before the Federal Court of Switzerland see AUER/MALINVERNI/HOTTELIER vol. 1, nn. 2094 ff.

B. Formal or objective requirements for access

Additionally to the proven legal interest in bringing proceedings as a personal quality of applicants, the filing of complaints and requests to constitutional courts is also restricted by formal or objective access requirements.[78]

Besides the requirement to exhaust existing legal remedies before the judiciary, the limited jurisdiction of constitutional courts constitutes a frequent reason for the rejection of submittals in practice. Furthermore, all states make the admissibility of appeals contingent on the fulfilment of requirements regarding their form, language and signature. Another effective access hurdle is the obligation to substantiate the alleged inconsistency of state acts with the constitutions. Also temporal restrictions of the access entitlement and the forfeiture of the right to submit complaints or requests to the constitutional courts after the expiry of a certain time limit constitute common procedural requirements. The imposition of a financial burden finally keeps individuals from making use of their access rights in an abusive way or without due diligence. This is achieved by prescribing a mandatory legal representation, by the obligation to pay court fees or taxes or by the possibility of the courts to impose penalty fees or fees to reimburse expenses for proceedings initiated upon frivolous submittals.

C. Qualitative requirements for access

Requirements with respect to the quality of appeals constitute another common means to restrict the access of individuals to constitutional courts.

Courts can be empowered to accept for consideration only such submittals with a prospect of success or such that are significant for the objective constitutional order or for the protection of the personal legal position of the complainants. In Germany for instance, the qualitative criteria for the selection of applications by the Constitutional Courts are prescribed by law.[79] The *writ of certiorari* on the other hand, entitles the Supreme Court of the United States to establish own criteria and to reject applications based on its own discretion and without any justification.[80]

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78 See for many BRUNNER, Zugang des Einzelnen, 210 f.; VAN DIJK, 13 ff.; HARUTYUNYAN/NUSSBERGER/PACZOLAY, n. 7.

79 § 93a para. 2 lit. a and b Constitutional Court Law of 1951.

80 Rule 10 Rules of the Supreme Court in the version of 12 January 2010.

Qualitative requirements constitute effective means to filter out potentially unsuccessful submittals or to exclude complaints that are too trivial to be decided by the constitutional courts. Yet, the assessment of their fulfilment necessarily entails a certain margin of appreciation, which is also considered to involve risks.[81] Besides an inconsistent or arbitrary application, such criteria can namely also serve as pretexts to the constitutional courts to avoid decisions on politically delicate cases.

II. Individual access by popular complaints

1. Actio popularis in Roman law

Both as term and as remedy, popular complaints or popular actions[82] originate from the *actio popularis* in Roman law. In its initial meaning, it constituted a claim right *(actio)* that could be lodged to an elected magistrate *(praetor)*. The entitlement to file such a claim was not conditional upon the fulfilment of any requirements. Rather, the circle of applicants was indefinite and unrestricted and encompassed any male Roman citizen *(quivis ex populo)*.[83] Its most significant role, the actio popularis played in Roman criminal law.[84] The incentive to submit an *actio* was the payment of punitive damages by a person charged for having committed a crime.[85]

The motivation for the submittal of an actio popularis has constituted a contentious issue in legal doctrine already for a long time. According to an older opinion it served as appeal for victims of criminal acts and for their personal advantages.[86] A majority of scholars denies such an interpretation. Their view is based on the argument that the term *popularis* not only implies the entitlement of every citizen, but also insinuates an altruistic or selfless incentive of applicants. Moreover, the lack of requirements of a personal or direct affection

81 BRUNNER, Zugang des Einzelnen, 215 f.; VAN DIJK, 14.
82 BRUNNER, Zugang des Einzelnen, 229; HALFMEIER, 199 ff.
83 HALFMEIER, 35; MOMMSEN, 378 f.
84 HALFMEIER, 29; LJUBIĆ, Ustavnopravna priroda prijedloga, 8.
85 LJUBIĆ, Ustavnopravna priroda prijedloga, 8.
86 CARL GEORG BRUNS, see reference in MOMMSEN, 376 n. 2 and VAN DIJK, 19, fn. 36.

as a victim of the invoked crime is considered as indication that the actio constituted a means to protect public welfare and to enforce the law in a general interest of the public.[87] Accordingly, fines levied by Roman criminal law primarily constituted financial remedies of the public for criminal offences suffered and served only secondarily for the applicants themselves.[88] They were an expression for the engagement of civil society for the compliance with the legal order as common or collective good.[89]

2. As access rights to constitutional courts

A. Distinctive features

If introduced as legal means allowing individuals to directly access to constitutional courts, the special features of popular complaints entail particular characteristics that distinguish them from other means of individual access.

a) Lack of admissibility requirements

Apart from the capacity to act and to take legal action, access is in principle not restricted by any further personal requirement. As per definition, the submittal of popular complaints does in particular not require a legal interest of the complainants.[90] They do not need to demonstrate a violation of their personal rights nor do they need to be personally, directly or indirectly affected by a contested act. Consequently, popular complaints can be filed for the protection of rights and interests of a third party or for the enforcement of the legal order in a public interest of society. In fact,

> «the very idea of standing is inappropriate to an actio popularis because the individual who is launching such an action is seen as "a trustee of the public good" rather than as someone with a particular grievance […]».[91]

Given the principally unrestricted entitlement to file popular complaints, access is granted to the broadest circle of applicants possible. Besides individual persons these complaints can in fact be filed by all legal subjects including

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87 MOMMSEN, 376. This view is shared in more recent literature, see for instance Black's Law Dictionary, 29 f.; HALFMEIER, 36 f.; LJUBIĆ, Ustavno-pravna priroda prijedloga, 8.

88 MOMMSEN, 378 ff.

89 For more details on the Roman actio popularis see HALFMEIER, 29 ff. and 43 ff.

90 See for many BRUNNER, Zugang des Einzelnen, 229; HALFMEIER, 199 f.

91 (*Punctuation added*). SADURSKI, 6.

state organs, public corporations and other public institutions. It even allows the submittal of collective appeals by associations without legal personality on behalf of the interest of its members or of the public interests. As a rule, the admissibility of popular complaints is not contingent on the fulfilment of formal or procedural requirements either.[92] The entitlement to file complaints is not restricted in time but granted at any time during the legal validity of a challenged act. They can be filed without having to exhaust all procedural means before the administration and judiciary. Furthermore, their submittal is neither conditional on the payment of court fees or taxes. Yet, the ideal of an absolutely unrestricted access does not correspond to reality. In practice, also popular complaints must meet requirements regarding form, content and substantiation.

b) Legal remedy against acts of legislation

As most significant consequence of the missing requirement to demonstrate a legal interest and personal concern, popular complaints can be filed against state acts which regulate legal relations in a general manner, without touching upon personal legal positions and rights.[93] In principle this includes formal laws enacted in legislative proceedings as well as other acts of legislation such as administrative regulations and decrees enacted based on local legislative autonomy and other general acts as part of the positive legal order of a given state.[94] If introduced, popular complaints consequently entitle individuals to request the constitutional courts to initiate judicial review proceedings against acts of legislation.

B. Judicial review by constitutional courts

The following paragraph aims at pointing out the most relevant features of judicial review as central form of constitutional adjudication.[95] This allows defining the object of investigation of this study, which is restricted to the accessibility of constitutional courts in general and by means of popular complaints in particular in concentrated systems of judicial review.

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92 BRUNNER, Zugang des Einzelnen, 229.

93 BRUNNER, Zugang des Einzelnen, 229; HARUTYUNYAN/NUSSBERGER/PACZOLAY, n. 74.

94 Collective agreements in public enterprises are perceived as parts of the domestic positive legal order in Macedonia, see MUKOSKA-ČINGO, 245.

95 AUER/MALINVERNI/HOTTELIER vol. I, n. 1887.

a) Conceptual basis

The idea of reviewing acts of the legislative authorities and of eliminating them for being inconsistent with the constitution can be traced back to 1803 to the landmark judgment *Marbury vs. Madison* of the US Supreme Court. With a few exceptions[96] this decision is considered as origin of judicial review and to have paved the way for its global spread as fourth state power.[97]

As law at stake the Judiciary Act was passed by the Congress in 1801 during the last days of power of President John Adams. The Act was considered to have been rushed through as a legal fortress against the anti-federalist attitude of Adams' successor Thomas Jefferson. In assessing the Act, Chief Justice John Marshall found that it violated fundamental constitutional values. Emphasizing that acts that are incompatible with the Constitution have to be invalidated, he declared the Act to be null and void. This decision was revolutionary since Judge Marshall could not base the Supreme Court's power to review and to invalidate unconstitutional laws on any explicit authorization by the Constitution or by law. Instead, he justified its decision by invoking the supremacy of the Constitution and the authority of the Supreme Court to guard the compliance of all state branches with the constitutional order.[98]

Still today, the undisputed superiority of the Constitution entails that it is binding to all state bodies including Congress as democratically legitimized legislative authority.[99]

b) Definition

Judicial review means the power to control the compliance of state acts with the constitution and with higher-ranking laws. While the term «judicial review» is common in English or American jurisprudence,[100] European legal doctrine refers to «constitutional review» or «constitutional control». This complies with German term *Verfassungskontrolle*, the French term *contrôle de constitutionnalité* or the Spanish term *control de constitucionalidad*. In a broader sense, it comprises the control over all types of state acts including

96 E.g. GINSBURG, 91 ff. As to KLEIN, 91 f. judicial review was already known under colonial rule by the Privy Council of Great Britain.

97 For a detailed description see BEATTY, 3 f.; CAPPELLETTI, 26 ff.

98 See BEATTY, 3; STEFFANI, 374 f.

99 Detailed with respect to the legal tradition of the USA in BEATTY, 1 f.; KOOPMANS, 37.

100 E.g. Black's Law Dictionary, 864; STONE SWEET, 21.

normative acts, acts and actions of an individual and concrete nature of administrative bodies and decisions and judgments of the judiciary.[101]

This study applies a more narrow understanding of judicial review. Accordingly, judicial review is understood as power to review acts of legislation and to invalidate these general acts in case of their inconsistency with the constitution. This complies with the respective German term *Normenkontrolle* or *contrôle des normes* in French.

aa) Judicial review in concentrated review systems

The present study on individual access relates to judicial review in concentrated or centralized review systems, where the competence to review laws and other acts of legislation is reserved to a tribunal that is institutionally and functionally separated and independent from the judiciary.[102] The German Federal Constitutional Court serves as a role model. It was founded on the basis of the ideals developed by Austrian scholar HANS KELSEN of a concentrated review power according to the Austrian Constitutional Court.[103] Owing to the raised human rights awareness after World War II, it has moreover been established on the basis of an extended understanding as supreme guardian of human rights and liberties.[104] Given the spread of such «concentrated» or «centralized review» throughout most of Europe, this form of constitutional adjudication is also known as «continental European system».[105]

As a principle administrative and ordinary courts are excluded from reviewing laws with respect to their compatibility with the constitution and obliged to refer to the constitutional court for a final and binding decision on the validity of a law or its cancellation.[106] Their competences are restricted to the review of decisions and state acts of an individual and concrete legal nature. Besides, the judiciary is empowered to review sublegislative acts as to their compatibility with the laws. This system and the European legal culture are signifi-

101 AUER/MALINVERNI/HOTTELIER vol. I, n. 1886. See also Black's Law Dictionary, 864.
102 KELSEN, Staatsgerichtsbarkeit, 54 f.
103 KELSEN, Hüter der Verfassung, 19, 36 f.; IBID., Staatsgerichtsbarkeit, 37 f.
104 BRUNNER, Festschrift Stern, 1043; GROTE, 7 f.; NUSSBERGER, 535 f.
105 E.g. ARNOLD, JOR 2002, 21 f.; EPSTEIN/KNIGHT/SHVETSOVA, 120 f.; STONE SWEET, 32 ff. AUER, n. 38, refers to a collective authorship.
106 ARNOLD, ZöR 2006, 11; BRUNNER, ZaöRV 1993, 847; GARLICKI, 46.

cantly influenced by the Rousseauean concept of unquestionable popular sovereignty, which was incompatible with the accountability of parliaments and their subjection to a control by ordinary courts.[107]

In systems of concentrated constitutional review, laws are reviewed *in abstracto*. Their compatibility with the constitution is assessed without any relation to a concrete litigation and the review relates to the textual dimension of a provision.[108] Acts of legislation or legal provisions that are incompatible with the constitution are sanctioned by being invalidated. The decisions of the constitutional courts have the same general abstract effect as the abrogated laws or act of legislation themselves (*erga omnes effect*).

bb) Distinction from diffuse and political review systems

The present study on individual access does not include access to judicial review proceedings in «diffuse» or «decentralized» systems.[109] Here, all courts of civil, criminal and administrative law are empowered to assess the compatibility of laws and acts of legislation with the constitution. The question of compatibility arises as a preliminary question in a concrete legal dispute upon which it is to be applied.[110] If a court considers a relevant legal provision as incompatible with the constitution, it will not apply it to the concrete case. The legal effect of the decision on incompatibility is limited to the concrete litigation (*inter partes effect*). Judicial review in diffuse systems is therefore referred to as «concrete» judicial review. Diffuse systems are common to Anglo-Saxon countries and can be found in the Scandinavian states and in Estonia as only Eastern European example. The accessibility of these courts depends on the pertinent procedural rules for applying to civil, criminal and administrative courts.[111]

Also systems of political review are excluded from the present study on individual access. In these systems, the power to review laws and other acts of legislation is reserved to the political authorities. Only a few European states

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107 See e.g. SCHUBARTH, 39, 41; For further details see FABBRINI, 1300 ff.; GIACOMETTI, 9 ff.; HABERMAS, 295 f.

108 SADURSKI, 5.

109 For a detailed description see AUER, nn. 30 ff.; CAPPELLETTI, 47 ff.; FAVOREU, 40 ff.; GINSBURG, 40 f.; STONE SWEET, 32 ff.

110 AUER, n. 51; STONE SWEET, 32 f.

111 BRUNNER, Zugang des Einzelnen, 197 f.

comprising the Netherlands, the United Kingdom and with respect to international treaties and federal laws Switzerland, provide for such a system of political control.[112]

c) Accessibility of judicial review proceedings

aa) Power to act at the own discretion

Only very few constitutional courts are authorized to initiate review proceedings on their own initiative (*ex officio* or *proprio motu*). Depending on their strength and the institutional significance of judicial review, the right to act at the own discretion can be awarded to a different extent.

Constitutional courts are frequently vested with a *partial ex officio power*. This is the case, if they are requested to assess the compliance of a judgment or a decision with the constitution and the law and in the same proceedings they incidentally review the relevant legal basis as to its compatibility with the constitution. Some constitutional courts exceed demands or allegations of received requests by reviewing contested laws with regard to other aspects of constitutionality or by reviewing other laws that are substantially connected with the ones contested. The power to continue review proceedings after the withdrawal of requests of authorized applicants can be considered as another form of partial ex officio power.

The most extensive form is the entitlement of constitutional courts to initiate review proceedings against laws without any previous request. Such an unlimited discretion in initiating review proceedings is rare and predominantly rejected.[113] Only a part of Successor States of the SFRY, namely Serbia, Montenegro, Croatia or Macedonia grant such a strong power and institutional position to their constitutional courts.[114]

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112 Art. 120 Constitution of the Kingdom of the Netherlands of 2002; art. 189 para. 4 and 190 Swiss Constitution of 1999. For more details with respect to judicial review in Switzerland see AUER/MALINVERNI/HOTTELIER vol I, nn. 1920 ff., 1937 ff., 1952 ff. With respect to the UK review model see KOOPMANS, 20 ff.

113 See Comments on the Constitutional Act on the Constitutional Court of the Republic of Croatia, Venice Commission Document CDL(2000)97, 5. For arguments of supporters see MARKOVIĆ, fn. 88; PINTARIĆ, 405; STEINBERGER, 16.

114 BRUNNER, ZaöRV 1993, 846; HARUTYUNYAN/NUSSBERGER/PACZOLAY, n. 75.

bb) Authorized applicants

The decision which applicants to authorize to request a constitutional court to review acts of legislation entails an essential political aspect. It is, on the one hand, significant for the strength and position granted to the constitutional courts.[115] On the other hand, it is an indicator for the nature and the protective function conceded to judicial review.[116]

In accordance to KELSEN'S perception, the abstract review of laws and other legislative acts is primarily aimed at the enforcement of the normative superiority of the constitution.[117] Based on the concept of mutual control and moderation of state powers, the supreme political organs including the central governmental bodies, individual members of government and the judiciary can be entitled to request the initiation of review proceedings against acts of legislation in all systems of centralized judicial review.[118] Following the idea to protect parliamentary minorities or just as an additional political tool for the opposition, also individual members of parliament or parliamentary fractions or groups can be authorized to this effect.[119]

In states with a vertical division of administrative and regulatory powers, the local political and executive organs are usually authorized to request the initiation of review proceedings against laws or other acts of legislation which violate their constitutionally granted autonomy to regulate issues of local concern.[120]

The circle of applicants authorized to request the initiation of judicial review proceedings can also comprise other public institutions, such as the ombudspersons or the public prosecutor's office.[121] Their authorization is generally restricted to the enforcement of matters of public interest within their competences. As is the case in Croatia, Slovenia and Macedonia, the ombudspersons are even entitled to do so if they consider a law as incompatible with human

115 KNEIP, 98.
116 BRUNNER, Zugang des Einzelnen, 202 f.; KELSEN, Staatsgerichtsbarkeit, 74.
117 Detailed KELSEN, Staatsgerichtsbarkeit, 78 ff.
118 E.g. STEINBERGER, 14.
119 BRUNNER, ZaöRV 1993, 845; SADURSKI, 93 ff.
120 For more details see STEINBERGER, 15, 25 ff., 33.
121 HARUTYUNYAN/NUSSBERGER/PACZOLAY, n. 72.

rights and liberties without any relation to a concrete case they are dealing with.[122]

Representing particular social interests such as environmental protection, the promotion of humanitarian law, or economic interests including consumer protection or trade and employment, also citizens' associations and social organizations like trade unions can be authorized to request the initiation of review proceedings against laws or other acts of legislation.[123]

cc) Access of individuals

Finally, also individual persons can be entitled to request the constitutional courts to review laws or acts of legislation with respect to their compatibility with the constitution.

The German constitutional complaint, for instance, can also be filed by applicants who consider their personal rights and liberties violated by an individual act that was adopted on the basis of an allegedly unconstitutional law or other act of legislation.[124] Not the individual act but its normative basis is object of complaint and reviewed with regard to its compatibility with the constitution. These complaints are referred to as «normative constitutional complaints».[125] Such complaints are also known to Belgium, Poland or Luxembourg. Yet, given their subsidiary nature, according to which applicants must exhaust all legal remedies against individual acts before referring to the constitutional court, the practical relevance of such complaints is rather low.[126] In Austria, on the other hand, applicants are entitled to request the initiation of review proceedings against violations of their personal rights and liberties by laws or regulations, that, without having been applied by decision or ruling, have a direct effect on their legal positions.[127] In this respect, one can find terms like «subjective constitutional review» or «individual constitutional review».[128]

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122 HARUTYUNYAN/NUSSBERGER/PACZOLAY, n. 67. The authorization of ombudspersons in these three states will be analyzed more thoroughly in Chapter 2, pp. 78 f.

123 ARNOLD, ZöR 2006, 8; BRUNNER, ZaöRV 1993, 845 f.; KAUČIČ/PAVLIN/BARDUTZKY, 34 f.

124 See above at p. 8.

125 E.g. ARNOLD, ZöR 2006, 14; HARUTYUNYAN/NUSSBERGER/PACZOLAY, n. 77. For more details see BRUNNER, Festschrift Stern, 1052 ff.

126 EPPING, n. 175; KLUTH, 79, 113.

127 See above at p. 8.

128 HARUTYUNYAN/MAVČIČ, chapter V.A.; OMEJEC, O potrebnim promjenama, 58.

Eventually, individuals can be entitled to contest laws or other acts of legislation without having to demonstrate a personal concern and legal interest. The classification and function of such popular complaints requires a more thorough examination. As subject-matter of the present study, these remedies will be analysed in detail in the following.

C. Binding nature

As means allowing individuals to directly access the constitutional courts, the submittal of popular complaints can have a binding effect. As has been shown, a binding nature is given if a constitutional court is obliged to initiate review proceedings against a challenged act of legislation.

Practical considerations and the inherent risk of overburdening the courts speak for a non-binding nature of popular complaints.[129] Individuals are accordingly entitled to give an impulse for the review of acts of legislation, while the decision to open review proceedings is reserved to the discretion of the constitutional court. Such complaints are referred to as «suggestions»,[130] «incitements»,[131] or «proposals»[132]. Popular complaints have no procedural significance in systems with an unlimited discretion of the constitutional court to take them into consideration and to initiate review proceedings. In such cases, they are nothing more than encouragements.[133]

Yet and in accordance with the definition of individual access rights provided above, even suggestions have a binding effect, if a constitutional court is obliged to justify rejections.[134] For this purpose, there are special formalized proceedings which are terminated by a formal ruling whether or not to take received complaints into consideration and to review the contested provisions with respect to the alleged unconstitutionalities. Having such a procedural effect, even mere suggestions or proposals can be regarded as legal means allowing direct individual access to constitutional courts.[135]

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129 With respect to former Czechoslovakia see MARKOVIĆ, 80.
130 HARUTYUNYAN/NUSSBERGER/PACZOLAY, n. 75.
131 BRUNNER, Zugang des Einzelnen, 233.
132 The Croatian proposal will be analyzed in detail in Chapter 3, pp. 107 ff.
133 HARUTYUNYAN/NUSSBERGER/PACZOLAY, n. 75.
134 See above p. 3.
135 See also BRUNNER, Festschrift Stern, 1056; IBID., Zugang des Einzelnen, 233 f.

D. Practical relevance as means of individual access

Unlike constitutional complaints, popular complaints are far less common as remedies allowing individual access to constitutional courts. Finding their most extensive practical significance in Latin America and some African states, they constitute rather an exception than a standard in Europe.[136] In Western Europe, Malta appears to be the only state providing an actio popularis against acts of legislation.[137] Yet, given that human rights and liberties are explicitly excluded from the protection, its practical significance as individual access right to the Constitutional Court is rather low.[138] On the subnational level, the actio popularis exists in the German Land of Bavaria. Because it can only be filed against violations of constitutionally guaranteed rights by county laws or decrees, this legal remedy does not have a considerable practical significance either.[139]

As individual access right to constitutional courts, the popular complaint is more common in Eastern European states. It has been introduced together with the establishment of the Constitutional Courts in Georgia in 1996[140] and in Hungary after the transition in 1990. The Hungarian complaint was seen as prototype for the unrestricted actio popularis[141] until it was abolished with the enactment of the new Constitution in 2011. Finally, popular complaints can be found in the Successor States of the former SFRY. The practically unlimited accessibility of their Constitutional Courts can be considered as feature distinguishing these states from other constitutional systems in Eastern Europe. With the exception of Bosnia and Herzegovina and Kosovo, whose constitutions are considerably influenced by the Western community of states,[142] all other Successor States reintroduced this means of direct individual access to

136 BRUNNER, Festschrift Stern, 1042. See also Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary, Venice Commission Document CDL-AD(2011)001, nn. 57 f.

137 Art. 116 Constitution of 1964.

138 BRUNNER, Zugang des Einzelnen, 229.

139 Art. 98 sentence 4 Constitution of 1946 and art. 55 Constitutional Court Law of 1990. For a detailed analysis of the Bavarian popular complaint see BOHN, passim.

140 Art. 39 para. 1 lit. a Constitutional Court Law. See BRUNNER, Zugang des Einzelnen, 230; HARTUYUNYAN/NUSSBERGER/PAZCOLAY, n. 74.

141 ARNOLD, JOR 2002, 26; BRUNNER, Festschrift Stern, 1056 f.; BRUNNER/SÓLYOM, 35 f.

142 E.g. BRUNNER, Festschrift Stern, 1056 f.; IBID., Zugang des Einzelnen, 233 f.

Constitutional Courts after their independence from the SFRY.[143] The popular complaints in Croatia, Slovenia and Macedonia will be analysed in Chapter 3.

III. Protective function of direct complaints

Their particular nature fundamentally differentiates popular complaints from other legal remedies in constitutional law proceedings. As individual access rights they show features of legal remedies for the protection of the rights and liberties of the applicants. As remedies for the initiation of judicial review proceedings they, at the same time, serve as means to enforce the constitutional order against the legislative authorities in an abstract way and with a legal effect which exceeds the subjective interests of the applicants (*erga omnes effect*).[144] This raises questions about the protective function of popular complaints.

This function will be analysed in the following. To this end, popular complaints will be compared to constitutional complaints as alternative means allowing individuals to directly access to constitutional courts. The main difference, the legal interest as admissibility requirement of the appeals, has an essential impact on the protective function of these two types of complaints.

1. Constitutional complaints

Generally speaking, constitutional complaints enable individuals to achieve protection against any act by the state and public authorities that violates their own constitutionally guaranteed rights. As has been shown, these complaints are of a strictly personal nature because their admissibility requires a legal interest of applicants in bringing proceedings before the constitutional courts.[145]

143 After the separation of the former State Union of Serbia Montenegro in 2006, the new constitutional bases for popular complaints can be found in art. 168 para. 2 Serbian Constitution of 2006 and in art. 150 para. 1 Constitution of Montenegro of 2007.

144 See explanation above p. 20.

145 See in this respect above at pp. 7 f.

In light of that, constitutional complaints constitute classic remedies for human rights protection. They extend the rights protection offered by the ordinary and administrative judiciary to the constitutional court and to acts and actions of the state authorities. Complaints considered as justified result in the invalidation of the contested rights violating act, while the Constitutional court returns the issue to the responsible authority for reconsideration. The legal effect of the court's decision is consequently limited to the litigation at stake and enforces the personal rights of applicants against responsible authorities (*inter partes effect*).

This leads to the conclusion that the function of constitutional complaints is the protection of the own individual rights and liberties of the complainant.[146] In other words, their function can be described as *Individualrechts-schutz* or as «subjective protection of rights».

The same can be said with respect to the normative constitutional complaints as provided in Austria and in Germany. Even though they result in an abstract review of the respective laws or acts of legislation, applicants are required to demonstrate a personal legal interest in bringing these review proceedings.[147] Given that they are submitted for the protection of the subjective rights of the applicants, judicial review serves the protection of the applicant's individual rights. However, it is worth mentioning that a further-reaching protective effect has been recognized with respect to the German constitutional complaint. If these complaints are filed against unconstitutional laws and other acts of legislation constituting the basis for rights violating acts or actions, they are acknowledged to enforce the constitutional guarantees in a general interest as well.[148] The German Federal Constitutional Court namely recognized a parallel «objective protection» by means of these complaints, considering the constitutionally guaranteed rights and liberties as an objective system of values (*objektive Wertordnung*).[149]

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146 Instead of many BRUNNER, Festschrift Stern, 1045 f.; HARUTYUNYAN/NUSSBERGER/PACZOLAY, n. 81; KLUTH, 77.

147 See above at pp. 8 and 23 f.

148 HÄBERLE, 14 f. KLUTH, 77 considers the protection of the objective constitutional order as mere reflex of the German constitutional complaint.

149 Decision *Lüth* of 15 January 1958, BVerfGE 7/198, nn. 27 and 30.

2. Popular complaints

A. Protection of collective or public goods

According to a widespread view, popular complaints exclusively or primarily serve the protection of the constitutional order in a general interest.[150] This view is based on the objective of judicial review to enforce the abstract constitutional order against the legislative authorities. It is also based on the absence of the requirement of a legal interest and a personal concern.

With the entirety of people or a society as beneficiary of popular complaints, the function of popular complaints can be described as «objective protection». Complaints are filed with the motivation to enforce the constitution and the constitutional guarantees against the legislator and the political powers as public or collective goods.[151] The good at stake is the general coherence of acts of legislation with the constitution and the constitutional principles such as the rule of law, the separation of powers or the welfare state. As to a more recent view, the circle of recognized public or collective goods moreover comprises environmental issues, issues related to consumer protection and, especially, to human rights and liberties.[152]

According to this view the motivation of applicants to submit popular complaints is primarily altruistic. The incentive to achieve subjective rights protection is acknowledged at most as side effect.[153] Rather than seeking their own benefit, applicants become active as members of a social or political community and act as representatives of the public or common interest.[154]

The recognition of goods or interests that are socially relevant and exceed the subjective interests of individuals even comprises civil law matters, where the submittal of legal remedies without proof of a personal concern and legal interest is principally alien. The perception of legal remedies and means that allow collective redress can be found in private law relations as well.[155] In Germany open access by means of popular complaints or collective appeals

150 E.g. ARNOLD, ZöR 2006, 8; JELLINEK, 67 f.; MASING, 68 f., 93 ff., 119 f. Other opinion LJUBIĆ, Karakter prijedloga, 800 f.

151 HALFMEIER, 46 f.; JELLINEK, 72 f.; SADURSKI, 6. A detailed distinction between public, individual and collective interests is provided by JELLINEK, 109 ff. and VAN DIJK, 29 f.

152 VAN AAKEN, 45.

153 BRUNNER, Zugang des Einzelnen, 229.

154 VAN DIJK, 202 f.; HARUTYUNYAN/NUSSBERGER/PACZOLAY, n. 74.

155 VAN DIJK, 10; HALFMEIER, 16 ff., 199.

through social associations has been introduced in several sectors of private law. Anybody is, for instance, entitled to claim the revocation of the validity of patents based on patent law or to claim the elimination of registered brands according to the law on trademarks. Popular appeals moreover play a significant role in consumer protection legislation.[156]

The perception of popular complaints as remedies filed out of exclusively or primarily altruistic motives holds true with respect to the complaint provided in Malta. Established to serve public interests, allegations about violations of human rights and liberties are explicitly excluded:

> «[a] right of action for a declaration that any law is invalid on any grounds *other than inconsistency with the provisions of art. 33 to 45 of this Constitution* shall appertain to all persons without distinction and a person bringing such an action shall not be required to show any personal interest in support of his action.»[157]

However, such an explicit exclusion appears to be exceptional and not common to other systems of constitutional adjudication with popular complaints as means of direct individual access. At this point, it is worth mentioning that the fact that therewith individuals fulfil a police-like function[158] and a constitutional task that is reserved to the state authorities is very controversial.[159]

B. Remedy for individual rights protection

In fact, the absence of a required legal interest does not preclude the filing of these remedies out of personal motives. In other words, even if they do not have to demonstrate a personal concern, individuals can file popular complaints with the incentive to reach the invalidation of acts of legislation for their own legal benefit. This is recognized by the Venice Commission as well, who holds that the motivation of individuals to initiate review proceedings is exclusively or at least primarily focussed on the protection of human rights.[160] In the opinion of some scholars the prospect of a personal benefit is even indispensable for the willingness to file complaints and to bear the costs and other burdens related to judicial access.[161] The improvement of the subjective

156 For a detailed analysis see HALFMEIER, 51 ff.
157 (*Italics added*). Art. 116 Constitution of 1964.
158 HALFMEIER, 276.
159 See ARNOLD, ZöR 2006, 8; JELLINEK, 72; LOPEZ GUERRA, 25 f.; MASING, 68 f.
160 HARUTYUNYAN/NUSSBERGER/PACZOLAY, n. 24.
161 VAN AAKEN, 8 ff., 11 refers to the «rational-choice theory».

position is not merely a side effect but the main incentive for the submittal of complaints. This incentive can be of a legal nature, if a law or other general act is considered to, even just hypothetically, negatively interfere with the own rights and liberties.[162] Furthermore, the incentive to contest an act of legislation can also be of a non-legal nature, namely if a legal provision is considered to be detrimental for religious, ethical, moral, political, economic or another factual reason.

This shows that, depending on given procedural arrangements, popular complaints can also be considered as remedies for individual rights protection. The two factors described in the following support this view even more.

a) Prospect of concrete legal benefits

Abstract judicial review proceedings can be combined with particular procedural measures, which provide applicants with concrete legal benefits.

aa) Suspension of applicability of contested legal provisions

A common measure is the right of applicants to request the provisional non-applicability of a contested law or other general act for the duration of the review proceedings. In Germany for instance, applicants filing constitutional complaints are entitled to request the Federal Constitutional Court to suspend the application of legal provisions, which create an imminent risk of grave and irreparable harm to them.[163]

The necessity to order the temporary suspension of a contested legal provision is a consequence of the missing suspensive effect of constitutional court proceedings. Accordingly, the initiation of review proceedings does not hamper the applicability and execution of contested state acts. Hence, also contested legal provisions remain applicable and enforceable by the administrative and judicial bodies. With the temporary suspension of their applicability, rights violations resulting from the execution of potentially unconstitutional legal provisions can be prevented before the final decision of the constitutional court.

Such measures are a necessary requirement for an effective protection of rights and liberties. From the perspective of petitioners, the temporary suspension significantly facilitates the protection of their individual rights from concrete

162 E.g. BRUNNER, Festschrift Stern, 1056.
163 Art. 32 Constitutional Court Law of 1951.

violations. If they succeed in substantiating a threat of grave and irreparable consequences, they can anticipate violations by preventing the passing of forthcoming decisions and acts or the execution of individual acts that would violate their rights. Consequently, this precautionary measure has a significant rights-protecting effect.[164]

bb) Appeals for reconsideration

Another means combining abstract review proceedings with a prospect of concrete personal benefits for the applicants is the right to request the reconsideration of final decisions and individual acts which had been adopted in application of laws subsequently annulled for being unconstitutional. Such appeals for reconsideration can be found in Croatia, Slovenia and Macedonia and will be described in detail in Chapter 3.

As a consequence of the principle of legal certainty, final individual acts and decisions merely become contestable even if the constitutional courts annul their legal bases with a retroactive effect.[165] With the introduction of appeals for reconsideration applicants have a remedy against violations they already suffered based on such final decisions. Even after a final ruling, they can, on the basis of successful complaints that led to the annulment of legal provisions, request the responsible court or state authority to reopen proceedings in which they had adopted the respective ruling. If violations suffered cannot be remedied anymore by a change of individual acts or decisions, indemnity of the applicants can be achieved by providing a subsidiary appeal for reparation or compensation.

b) Substitute to missing alternative ways of individual access

Another decisive factor supporting the view on the significance of popular complaints as means of individual rights protection is the absence of alternative means of protection. Besides alternative possibilities to directly access constitutional courts, this moreover relates to the scope of protection offered by these alternatives. The possibility to file constitutional complaints as classic remedies for individual rights protection and the extent of protection offered play a significant role in this regard.

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164 See e.g. KRAPAC, Postupak pred Ustavnim sudom, n. 65.1. with respect to Croatia.

165 For a differentiation between the German *Nichtigkeitslehre* and the Austrian *Vernichtbarkeitslehre* see KELSEN, Staatsgerichtsbarkeit, 44 ff.

Popular complaints can be considered to serve as substitute for the protection of subjective rights if individuals are not entitled to file constitutional complaints. Illustrative is the access system to constitutional judiciary in the former SFRY, which will be described more thoroughly in the following paragraph. On the other hand, popular complaints can have a supplementary or compensatory function for individual rights protection in systems, where they offer a broader or easier access in comparison to constitutional complaints. Until its abolition in 2011, the practical significance of the Hungarian popular complaint, for instance, completely superseded the normative constitutional complaint as remedy for human rights protection.[166]

C. Correlation between the underlying interests

The strict categorization of the protective purpose of popular complaints is put into perspective by a widespread perception in constitutional doctrine and practice. Instead, popular complaints are perceived as remedies that enforce the constitutional order both as a common good and in a subjective interest of the applicant.[167]

Illustrative for this view are human rights and liberties, whose perception and institutional function has changed considerably in the course of time. By recognizing an extended protective effect of human rights protection, the German Federal Constitutional Court considerably contributed to today's understanding of rights and liberties. As common goods their protection in an individual case at the same time enforces these guarantees in an objective sense, namely as constitutional obligations or constraints to the state authorities.[168] The same has been recognized by the Bavarian Constitutional Court that states that the Bavarian popular complaint protects the constitutional rights and liberties as institutions in a public interest.[169]

This view complies with the perception of a «collective» or «mixed good character» of human rights and liberties in international law.[170] It also complies with the practice of the European Court of Justice (ECJ), who accentuated the significance of individual complaints for the protection of the Convention

166 BRUNNER/SÓLYOM, 34 f.; KELEMEN, 70; Venice Commission Document CDL-AD(2011)001, n. 61.

167 ERRASS, 1365 ff., esp. 1368 recognizes this fact also with respect to administrative law.

168 See above p. 27.

169 Decision VerfGHE 33/1of 14 March 1972, n. 7. See BOHN, 76 and 97 ff.

170 See detailed description in VAN AAKEN, 8 ff.

rights as common goods in its famous decision *van Gend en Loos vs. Netherlands:*

> «The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted […] to the diligence of the Commission and of the Member States.»[171]

VAN DIJK recognizes a correlation also in the reverse case. Accordingly, even if the primary incentive for the submittal of a complaint is the enforcement of these guarantees as common goods in a public or collective interest, the protection has an impact on the subjective position of the applicants as well.[172]

The correlation of subjective and public interests is ascertained also with respect to other constitutional guarantees. It is attributed to the role of the individual person as a member of a political society that jointly adopted the constitution as generally binding normative order. Just as the constitutional principles and guarantees are considered to reflect the public or general interest of the society, all legal guarantees reflect interests of the individual persons which can be of a legal, religious, moral or other factual nature.[173] Consequently, there is both a public interest of society and a subjective interest of the individual member of this society in the adherence of the political powers with these constitutional guarantees.

To sum up this view, popular complaints filed for the personal benefit protect the respective rights and liberties as public or common goods, while complaints filed for the protection of a common good, at the same time, improve the personal legal position of the applicants.[174]

D. Conclusion on the protective function

The strict categorization of popular complaints as remedies for the protection of constitutional guarantees as common or public goods or as means for individual rights protection is considered as redundant.[175] Whether or not popular

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171 (*Punctuation added*). Judgment *van Gend en Loos vs. Netherlands*, case no. C-26/62, ECJ decision of 5 February 1963, p. 13.

172 VAN DIJK, 202 f., 220 f.

173 A detailed discussion on the complexity of the differentiation between public and individual interests is provided by HALFMEIER, 204 ff.

174 As to VAN DIJK, 30 there is accordingly no «antithesis» but «[o]n the contrary, those two kinds of interests should be a function of each other».

175 HABERMAS, 188; HALFMEIER, 208 f., 217; VAN DIJK, 30.

complaints are filed as remedies for the protection of the subjective rights depends on the procedural arrangement. Furthermore, it depends to a great extent on the prospect of a personal legal benefit for applicants from the elimination of a contested act of legislation. Either way popular complaints can be considered to be of an essential significance for the enforcement of constitutions against legislative authorities. Their strong protective effect is recognized both for the protection of human rights and liberties[176] and for the enforcement of the rule of law and the principle of constitutionality in general.[177]

The following presents the practice of the ECtHR on the applicability of the ECHR standards to constitutional complaints and to popular complaints, if they are introduced as means of individual access to constitutional courts.

3. Relevant judicial practice of the ECtHR

Already in 1975 the ECtHR ascertained that the right of access to courts is an autonomous and indispensable component of the right to court as guaranteed by art. 6 para. 1 ECHR.[178] In accordance with the scope of the Convention, this guarantee is restricted to cases of civil law claims and to criminal law proceedings. The ECtHR consequently neither derives an obligation from the Convention to establish a constitutional court nor to introduce its accessibility to individuals.[179] Rather, the decision on how to comply with the obligation to provide for effective domestic protection of the Convention rights and to choose the institutions and legal remedies is left to the discretion of the member states.[180]

A. Standards relating to effective and accessible remedies

According to art. 6 para. 1 and art. 13 ECHR signatory states must provide legal remedies for the protection of the Convention rights before the last domestic instance of appeal which are effective, sufficient and accessible.[181] These qualities are indispensable for the fulfilment of the requirements laid

176 See to that effect SMERDEL/SOKOL, 161.
177 VAN AAKEN, 10; ARNOLD, JOR 2002, 27; KNEIP, 96.
178 Judgment *Golder vs. UK*, §§ 26 ff. and especially §§ 35 f. See above p. 2.
179 See to that effect judgment *James and others vs. UK*, 8793/79, A 98 (1986), § 81.
180 Art. 1 ECHR and paragraph B.4. lit. d Interlaken Declaration of 19 February 2010.
181 See MEYER-LADEWIG, art. 13 ECHR, nn. 10 ff.

down in art. 35 para. 1 ECHR. This rule obliges applicants to exhaust available domestic remedies which allow them to obtain redress for the violations alleged. Such domestic remedies must provide an adequate filter to preserve the ECtHR from an overload of complaints and guarantee an effective protection of the Convention rights by the responsible domestic authority.[182] In consistent practice the ECtHR acknowledges the effectiveness of access rights if they are available and sufficient to «obtain redress for the breaches alleged», their existence is «sufficiently certain, in practice as well as in theory» and if these remedies can be submitted «to the appropriate domestic body, at least in substance and in compliance with the formal requirements laid down in domestic law».[183]

In establishing whether domestic remedies constitute effective remedies, which must be exhausted based on art. 35 para. 1 ECHR, the ECtHR takes into consideration the concrete circumstances of each individual case.[184] In the first place, it takes into account the existence of other remedies for individual rights protection and their context in the domestic legal systems. Furthermore, it considers the personal circumstances of applicants and whether they did everything that can be reasonably expected to exhaust these domestic remedies.

At the same time the ECtHR acknowledges that the right to an effective remedy is not absolute and can be restricted within the limits prescribed by the Convention.[185] Restrictions must be evident, predictable and prescribed by a clear and explicit legal basis.[186] While individual access must be granted on a fair and equal basis, the restrictions must pursue a legitimate aim that is in proportion to the limitation of the access rights.[187] The efficacy of access rights may neither be compromised by the legislator when regulating requirements for the access to the responsible domestic instance, nor by the latter by applying a restrictive interpretation. Incompatible with the Convention standards

182 HARUTYUNYAN/NUSSBERGER/PACZOLAY, n. 90; MEYER-LADEWIG, art. 35 ECHR, n. 7.

183 See for many judgments *Ištván and Ištvánova vs. Slovakia*, 30189/07, 12 June 2012, § 65; *Scordino vs. Italy* (no. 1), 36813/97, 2006-V, § 142; *Ilhan vs. Turkey*, 22277/93, (2000-VII), § 58.

184 See e.g. decision of 8 July 2008 as to the admissibility of application, *Association of Citizens Radko and Paunkovski vs. Macedonia* (dec.), 74651/01, para. A.2.b.

185 E.g. judgment *Peruško vs. Croatia*, 36998/09, 15 January 2013, § 45.

186 E.g. judgment *Pillmann vs. Czech Republic*, 15333/02, 27 September 2005, §§ 17 ff.

187 Judgments *Waite and Kennedy vs. Germany*, 26083/94, 1999-I, § 59; *Ashingdane vs. UK*, 8225/78, A 93 (1985), § 57.

are requirements which entail invincible hurdles and undermine the access right. Examples are an excessive formalism in applying the requirements, a high financial burden or unreasonable temporal restrictions.[188]

a) Applicability to constitutional complaints

As has been shown, member states are not obliged to introduce constitutional adjudication or constitutional complaints based on the ECHR. In those states where provided, the ECtHR frequently considers these remedies as last domestic instruments which must be exhausted before it accepts individual complaints for consideration.[189] It for instance confirmed the applicability with respect to the German constitutional complaint and the Spanish *amparo*.[190] Only if the institutional and procedural arrangements of constitutional complaints comply with the procedural guarantees and the Convention standards, can they be regarded as effective and accessible remedies. This is certainly true for complaints raised against final state acts that regulate the rights and liberties of the complainants in a concrete and immediate manner and therefore directly interfere with the Convention rights.

b) Applicability to legal remedies against acts of legislation

A more differentiated look must be taken with respect to remedies that can be filed directly against acts of legislation. Because the entitlement to submit individual complaints to the ECtHR requires a concrete and personal impairment and according to consistent practice of the ECtHR does not constitute an *actio popularis*, a right to appeal against laws or other general acts can only be derived from the ECHR under particular conditions.[191]

The ECtHR recognizes that in some cases the convention rights can also be impaired directly by a legal provision and in the absence of an individual act passed in application of the latter. Such a direct concern requires a «victim status» of the applicant who, on the basis of a legal provision, is

188 FROWEIN/PEUKERT, art. 6, nn. 64 ff.

189 FROWEIN/PEUKERT, art. 35 ECHR, n. 12; MEYER-LADEWIG, art. 35 ECHR, n. 19.

190 Judgments *Gast and Popp vs. Germany*, 29357/95, (2000-II), § 75, and *Ruiz-Mateos vs. Spain*, 12952/87, A 262 (1993), §§ 55 ff., 60.

191 E.g. judgments *Aksu vs. Turkey*, 4149/04 and 41029/04, 2012, § 50; *Tănase vs. Moldova*, 7/08, 2010, § 104. For further references see FROWEIN/PEUKERT, art. 34, nn. 27 ff.

> «required either to modify his conduct or risks being prosecuted or if he is a member of a class of people who risk being directly affected by the legislation».[192]

In judgment *Aksu vs. Turkey,* the Court for instance acknowledged a victim status of the applicant, who as a member of the Roma community felt directly impaired by allegedly degrading provisions.[193] The Court applies a restrictive interpretation of the victim status and does not consider a merely hypothetic violation as sufficient. In certain cases it also acknowledged a victim status of the applicants if there is a potential threat of a violation and a real risk for its occurrence in a not too distant future.[194] In any case, the victim status and the violation must still persist at the time of review of the contested normative act by the Court.[195]

If a direct concern and victim status are given, the ECtHR requires the existence of an effective and accessible legal remedy which enables the persons concerned to directly contest such normative acts. In judgment *Tănase vs. Moldova* it established the lack of an effective remedy because the applicant was not entitled to directly contest a law that interfered with his legal position, but could only access the constitutional court by requesting the ombudsperson to file a request for the initiation of review proceedings.[196] If, conversely, the ECtHR does not consider an applicant to be directly affected by a contested legislative act, it will reject the complaint as *actio popularis*.[197]

B. Standards relating to fair judicial proceedings

Pursuant to art. 6 para. 1 ECHR the signatory states have to ensure an effective protection of Convention rights by guaranteeing fair judicial proceedings before the domestic judiciary.[198] Fair judicial proceedings comprise several aspects including the right to apply to judicial instances, to achieve judicial protection and the speedy conclusion of these proceedings. Another crucial aspect for an effective protection is the fairness of these trials.

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192 Judgments *Tănase vs. Moldova*, § 104; *Sejdić and Finci vs. Bosnia and Herzegovina*, 27996/06 and 34836/06, 2009, § 28; *Burden vs. UK*, 13378/05, 2008, § 34.

193 Judgment *Aksu vs. Turkey,* § 54.

194 See e.g. judgment *Burden vs. UK*, § 35.

195 Judgment *Tănase vs. Moldova*, § 106.

196 Judgment *Tănase vs. Moldova*, §§ 120–122.

197 E.g. judgment *Willis vs. UK*, 36042/97, 2002-IV, § 49.

198 For more details see FROWEIN/PEUKERT, ECHR art. 6, nn. 45 ff., 112 ff. and 187 ff.

Accordingly the ECtHR acknowledges the adversarial nature of proceedings as indispensable procedural guarantee.[199] Adversarial or adversary proceedings ensure the participation of applicants and enable them to exert influence on the decision-making with respect to the protection of their rights and liberties. This requires their full information and knowledge about objections, statements or evidences presented by counterparties or persons consulted. In addition, applicants must be duly summoned and invited to give their comments and statements.[200] These procedural standards can be fulfilled by granting applicants the status of parties to the proceedings and therewith vesting them with the constitutionally guaranteed procedural rights or by granting them specific participatory rights.

Another indispensable guarantee for fair trials is the publicity of the proceedings. For this purpose courts or judges schedule public hearings to which they invite and grant access to the interested public. Therewith, they ensure public scrutiny which protects the applicants against arbitrary decisions and guarantees an accurate establishment of relevant facts.[201] Public hearings are especially significant in first instance proceedings, in which evidence is taken and in which the facts relevant for the passing of the final decision are investigated. In principle they are moreover significant before instances of appeal that provide for oral proceedings.[202]

Under certain conditions both the Venice Commission and the ECtHR recognize the applicability of Convention standards for fair trial in proceedings before constitutional courts which are initiated upon complaints by individual persons.[203] The nature and the protective purpose of these proceedings are essential in this regard.[204]

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199 E.g. judgment *Nideröst-Huber vs. Switzerland*, 18990/91, 1997-I, § 30.

200 See e.g. judgments *Juričić vs. Croatia,* 58222/09, 26 July 2011, § 73; *Milatová and others vs. Czech Republic*, 61811/00, 2005-V, § 59; *Krčmář and others vs. Czech Republic*, 35376/97, 3 March 2000, § 44.

201 Judgments *Juričić vs. Croatia,* § 84; *Stefanelli vs. San Marino*, 35396/97, 2000-II, § 19.

202 With respect to military courts see judgment *Engel and Others vs. Netherlands*, 5370/72 et al., A 22 (1976), § 89.

203 E.g. judgment *Kraska vs. Switzerland*, 13942/88, A 254-B (1993), § 26; Venice Commission Document CDL-AD(2006)036rev, n. 33.

204 Bohn, 79; Häberle, fn. 68.

a) Applicability to constitutional complaint proceedings

The analysis of the pertinent jurisdiction reveals that the ECtHR in principle acknowledges the applicability of the standards for fair trials to constitutional complaint proceedings.[205] The ECtHR hence frequently accuses member states for violating the right to a speedy trial, because of the unreasonably long judicial processes which are the result of the subsidiary nature of these complaints.[206]

b) Applicability to judicial review proceedings

Because of their principle function to ensure the abstract compliance of laws and other legislative acts with the constitution, the constitutional courts as a rule investigate the relevant points of law and the facts of the case themselves (*inquisitorial principle*). Authorized applicants, on the other hand, neither exert influence nor impact on the continuation of the proceedings by withdrawing their requests.[207] The individual justice model upon which the Convention is based does therefore in principle not apply to judicial review proceedings.

However, such an undifferentiated approach does not reflect the actual functions of review proceedings in the individual states. While, for instance, constitutional complaint proceedings are of a non-adversarial nature in Germany,[208] the abstract review of acts of legislation is conducted in adversarial proceedings and with the formal participation of applicants in Austria.[209] With Malta as only exception, the small number of states who introduced popular complaints as means of individual access to their constitutional courts perceives abstract judicial review either explicitly or implicitly as procedures that serve the purpose of individual rights protection.

By taking into consideration the procedural particularities of each constitutional court, the ECtHR consequently ascertains in each individual case whether these remedies must be exhausted in accordance to art. 35 ECHR.[210] It accordingly rejected the applicability of the standards for fair trial for the

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205 See also FROWEIN/PEUKERT, article 35, n. 24.

206 See for many judgments *Scordino vs. Italy*, § 227; *Ruiz-Mateos vs. Spain*, § 53; *Kudła vs. Poland*, 30210/96, 2000XI, § 152; *Ištván and Ištvánova vs. Slovakia*, §§ 66 f. and 107 ff.

207 With regard to the Bavarian popular complaint see BOHN, 79 f.

208 See HÄBERLE, 15 with reference to the relevant jurisdiction of the German Federal Constitutional Court in fn. 68; KLUTH, 73.

209 KORINEK, 266 f.

210 See e.g. judgment *Gast and Popp vs. Germany*, § 75.

review proceedings before the Lithuanian Constitutional Court, because these proceedings

> «cannot be regarded as a remedy within the meaning of [...] the Convention as the Constitutional Court cannot afford redress for a violation of the rights of an individual, but may only examine the compatibility of a law with the Constitution» and because «a constitutional action was not accessible to the applicant personally or directly.»[211]

The ECtHR considered the Lithuanian proceedings to be established exclusively for the enforcement of the objective constitutional order.

On the other hand, it acknowledges the applicability of the Convention standards to such review proceedings that – explicitly or implicitly – *also* serve the purpose of individual rights protection and that are closely connected with proceedings comprised by the scope of the Convention. This requires that the review of a law or act of legislation is closely related to concrete civil or criminal law proceedings in which an applicant is involved. In other words, the decisions on the constitutionality of reviewed laws must be directly decisive for the outcome of the respective civil or criminal law cases.[212] Then the applicability of the Convention standards to the review proceedings is an indispensable requirement for the effective protection of the convention rights.[213] The ECtHR for instance established a violation of the Convention by the Spanish Constitutional Court for its failure to invite the applicants to participate in the review proceedings in which it assessed the legally prescribed expropriation of assets that was decisive for their civil law claims.[214]

The jurisdiction of the ECtHR also shows a differentiated practice with respect to the required publicity of judicial review proceedings. While the assessment of constitutional courts is normally restricted to points of law and the applicable constitutional provisions, the courts of lower instances investigate the facts and evidences. Considering the publicity of proceedings before the lower instances as sufficient, the ECtHR therefore in principle denies an obligation of

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211 (*Punctuation added*). See the two decisions of 14 March 2000 on the admissibility of applications, *Puzinas vs. Lithuania* (dec.), 44800/98 and *Valašinas vs. Lithuania* (dec.), 44558/98.

212 The ECtHR established such a direct link in judgments *Kraska vs. Switzerland*, § 26; *Gast and Popp vs. Germany*, §§ 65 ff.; *Ruiz-Mateos vs. Spain*, § 59.

213 E.g. judgment *Olujić vs. Croatia*, 22330/05, 5 February 2009, §§ 31–43. See accordingly also judgment *Gast and Popp vs. Germany*, § 64.

214 Judgment *Ruiz-Mateos vs. Spain*, § 63.

constitutional courts to schedule public hearings.[215] Vice versa, in cases where the constitutional courts investigate facts or evidences in order to pass a decision, the publicity of proceedings must be guaranteed. Accordingly, the ECtHR ascertained violations of this obligation by the Czech Constitutional Court who was asked to assess an allegedly incorrect interpretation or an insufficient establishment of facts but failed to schedule a public hearing,[216] and for basing its findings on new evidence without giving the applicants an opportunity to give their statement.[217]

IV. The popular complaint in the SFRY

The official Marxist-Leninist doctrine in the understanding of the Union of Soviet Socialist Republics USSR had been based on the idea of absolute inconsistency of any type of extra-parliamentary supervision over the assembly as supreme representative of the working people. It furthermore had been considered as absolutely incompatible with Stalinist ideology of total political control exercised by the communist party. In fact, constitutional adjudication was rejected as a bourgeois institution.[218]

After the break of Yugoslav President Josip Broz Tito with Stalin and the exclusion of the SFRY from the Cominform (Communist Information Bureau) on 28 June 1948, Yugoslavia followed its own socialist ideology based on self-management and decentralized socialism (so-called *Titoism*). The ideological emphasis was laid on the sovereignty of the working class and the working people and aimed at the liberation of society from exploitation and at its emancipation through self-management.[219] At the same time and in contrast to the USSR and other socialist systems, Yugoslav political ideology saw no contradiction between judicial review and socialist rule.[220]

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215 Judgments *Milatová and others vs. Czech Republic*, §§ 62 f.; *Juričić vs. Croatia,* § 89.
216 Judgment *Milatová and others vs. Czech Republic*, §§ 64 ff.
217 Judgment *Krčmář and others vs. Czech Republic*, §§ 41 ff.
218 Brunner, ZaöRV 1993, 821; Djurišić, 183; Klenner, 803; Petev, 24 f.
219 Mratović/Filipović/Sokol, 396 f. See also Đorđević, Ustavno pravo, 141.
220 Klenner, 803; Sadurski, 2 f.; Schweissguth, 183.

In 1963 the SFRY introduced constitutional judiciary as the first communist state, followed by Czechoslovakia (1968) and Poland (1982).[221] On the basis of the model of KELSEN[222] the Federal Constitutional Court of the SFRY was established with the enactment of the Federal Constitution in 1963[223]. The system of Yugoslav constitutional adjudication moreover comprised the Constitutional Courts of the six Socialist Republics and was extended by the newly established Constitutional Courts of the Autonomous Provinces of Vojvodina and Kosovo with the enactment of the second Federal Constitution in 1974.[224]

1. Judicial review and the SFRY

To explain the logic of establishing a system of constitutional adjudication and the opening of constitutional courts to individual access, it is necessary to outline the guiding political principles in the SFRY in a first step.

A. The Yugoslav socialist system of self-management

The major political objectives of the SFRY – liberation of any form of exploitation and social emancipation – were to be achieved by self-management. As the fundamental principle of Yugoslav socialism, the entire political system and all spheres of economic and social life were designed based on self-management.[225] The vast number of self-governing bodies comprised federal entities and the self-managing socio-economic organizations and political bodies.

The SFRY consisted of the Federation, the six federal Socialist Republics (SR) Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia and as of 1974, the two Autonomous Provinces of Kosovo and Vojvodina.[226] The existence and autonomy of the Republics were guaranteed by the Federal Constitution and of the provinces Kosovo and Vojvodina by the Federal Constitution and the 1974 Constitution of the SR of Serbia.[227] Despite the

221 AUER, n. 39.

222 MAVČIČ, Slovenian constitutional review, 10; OMEJEC, O potrebnim promjenama, 37.

223 Art. 241–251 Constitution of the SFRY of 7 April 1963 (Cst. SFRY 1963), Službeni list SFRJ (Official Gazette of the SFRY), no. 14/63. The first Constitution of the former Yugoslavia was adopted in 1946, the second one in 1953.

224 Art. 375–396 Constitution of the SFRY of 21 February 1974 (Cst. SFRY 1974), Službeni list SFRJ, no. 9/74.

225 BLAGOJEVIĆ, 4, 15 ff.; ĐORĐEVIĆ, Ustavno pravo, 277.

226 Art. 2 para. 1 Cst. SFRY 1963 and art. 2 Cst. SFRY 1974.

227 Art. 109 Cst. SFRY 1963 and art. 5 Cst. SFRY 1974.

regulatory autonomy of the Republics and Provinces, their constitutions and laws were predetermined by Federal Law both in form and in substance.[228] Actual legislative autonomy was only granted with respect to their internal governmental organization. The constitutional documents in the SFRY were consequently practically identical in content and form.[229] By shifting important competences from the Federation to the republic and provincial level, the 1974 Constitution reinforced the factual sovereignty of the Socialist Republics and the Provinces. This decentralization had been a result of increasing claims for more autonomy.[230]

Self-management also constituted the structural basis of the economic system of the SFRY. The working people united to organizations of free associated labour in form of enterprises and to other interest groups such as labour or social organizations or unions in the field of education, culture and health.[231] Within the framework of the Federal Social Plan, these associations enacted their own statutes and regulated their internal organization, development, the use of means of production, the products and services offered and their internal and external relations and financial means.[232] The workers were involved in the decision-making through means of direct participation and the election of representatives.[233] With the enactment of the 1974 Constitution, special courts and an attorney for the defence of self-management rights of the working people had been introduced.[234]

Finally, the principle of self-management also extended to the political field. State power was accordingly executed by all members of society, comprising citizens as political and the working people as economic subjects.[235] The electorate was represented in assemblies on each socio-political level, starting

228 Art. 148 f. Cst. SFRY 1963 and art. 206 Cst. SFRY 1974.

229 Beckmann-Petey, 64; Marković, 133 f.

230 For a detailed analysis of the division of tasks in the federal setup of Yugoslavia see Beckmann-Petey, 135 ff., 167 ff.; Schultz, 15.

231 Art. 14 f. Cst. SFRY 1963 and art. 90 f. Cst. SFRY 1974. Broekmeyer, 134; Lapenna, 215 f.

232 Art. 9 para. 1 and 91 Cst. SFRY 1963 and art. 14 and 69 Cst. SFRY 1974.

233 Art. 10 para. 2 Cst. 1963 and art. 89 Cst. 1974. See hereto Expert explanations Cst. SFRY 1974, 56 f.; Lapenna, 222 ff.; Leonardson/Mirčev, 189 f.

234 Art. 129 ff. Cst. SFRY 1974.

235 Leonardson/Mirčev, 191; Wilson, 254 f.

from the communities as lowest to the Provinces, the Republics and the Federation as supreme administrative level.[236] The leading political institutions, the League of Communists (*Savez Komunista Jugoslavije*, SKJ), the central interest groups of the Socialist Alliance of Working People of Yugoslavia (*Socijalistički savez radnog naroda Jugoslavije*) and the unions were represented in each of these assemblies as well.[237] Direct elections were provided only at the lowest level in neighbourhoods or voter meetings.[238] Direct participation was realized through plebiscites that could be scheduled by the assemblies of the different socio-political levels.[239]

B. The principles of constitutionality and legality

The principles of constitutionality and legality were not unknown in socialist systems. The Federal Yugoslav Constitution recognized their fundamental value for the socialist system by dedicating them own constitutional chapters.[240] In accordance to the political ideology these principles fulfilled a double purpose.

a) Legal principles

On the one hand, the principles of constitutionality and legality ensured the uniformity of the legal system of the SFRY. The Yugoslav legal system comprised the state-made Constitutions and laws on the federal, republic, provincial and on the community level, as well as the statutes and other general acts passed by the numerous socio-economic organizations.[241] The consistency of the legal order required the compatibility of all normative acts with the Federal Constitution and laws.

b) Political principles

Based on socialist ideology these principles fulfilled a political purpose as well. Firstly, the compliance of the normative order with the Constitution and

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236 ĐORĐEVIĆ, Caractéristiques fondamentales, 659; SCHWEISSGUTH, 188. For a detailed description of the assembly system, see ĐORĐEVIĆ, Ustavno pravo, 333 ff.; FIRA, 312 f.

237 See BECKMANN-PETEY, 79 ff., 95 ff., 310 ff.; ĐORĐEVIĆ, Ustavno pravo, 167 ff.

238 Art. 75 ff. Cst. SFRY 1963 and art. 139 Cst. SFRY 1974.

239 Art. 89 Cst. SFRY 1963 and art. 89 Cst. SFRY 1974.

240 Chapter VII Cst. SFRY 1963 and chapter IV Cst. SFRY 1974. For a detailed analysis see ĐORĐEVIĆ, Ustavno pravo, 341 ff.

241 Expert explanations Cst. SFRY 1974, 549; FIRA, 316.

the laws ensured the emancipation and liberation of society as ultimate political objective on every self-regulating level.[242] Secondly, the consistency of the entire legal system was indispensable for the functioning of the Yugoslav socialist system in general and for the operability of the internal market in the sectors of trade, economy, banking, credits and taxes in particular.[243] Inconsistencies of the decentralized normative order could jeopardize the political and economic stability and lead to long-lasting social disadvantages. The principles of constitutionality and legality played an integrative role and guaranteed the unity and cohesion of the SFRY and the advancement of the socialist system.[244] In contrast to a liberal perception, these principles even imposed obligations to the individual citizens and working people.[245] The only body not subject to these principles was the SKJ, that had unlimited discretion in determining the social agenda and in ensuring the development and progress of the socialist system.[246]

Based on this, it seems that the principles of constitutionality and legality primarily served a political purpose in the SFRY. Their guarantee as positive and constitutional law was a way of ensuring their legal enforceability.[247]

C. Indispensability of judicial review

The ideological tension between parliamentary supremacy and judicial review had been issue of theoretical and ideological discussions among Yugoslav constitutional scholars as well.[248] There was however general agreement that the establishment of constitutional judiciary was indispensable for the enforcement of constitutionality and legality. Only a few scholars justified judicial review by purely legal arguments, considering it as necessary to ensure the consistency of the constitutional and legal order from the perspective of the rule of law.[249] Pursuant to the prevailing legal opinion at this time, the establishment of constitutional adjudication in the Yugoslav socialist system was

242 Đorđević, Ustavno pravo, 346; Fira, 314.
243 Đorđević, Caractéristiques fondamentales, 696 f.; Marković, 18 f.; Stjepanović, 49.
244 E.g. Đorđević, Ustavno pravo, 748; Fira, 332, 336; Mratović/Filipović/Sokol, 510.
245 Art. 63 Cst. SFRY 1963 and art. 205 Cst. SFRY 1974. See Expert explanations Cst. SFRY 1974, 352 f.; Marković, 128.
246 Schweissguth, 195.
247 Expert explanations Cst. SFRY 1974, 351; Fira, 312.
248 See Mavčič, Slovenian constitutional review, 36; Sokol, Položaj ustavnih sudova, 151.
249 E.g. Krbek, 6 ff.

considered as prerequisite of stability and functionality and was therefore justified based on political considerations.[250]

The majority of Yugoslav constitutional scholars endorsed both the introduction of a constitutional court and its power to review legislative acts. They recognized that mechanisms of political self-control had failed to guarantee the stability of the socialist system. Besides, the power to review laws and other acts of legislation could not be conceded to the ordinary judiciary.[251] Because of the far-reaching autonomy of the Socialist Republics and Provinces, it could neither be conferred to any federal political or judicial organ.[252] Only the Federal Constitutional Court, whose composition mirrored the multinationality of the Federation, could be considered as legitimate to resolve conflicts between the numerous political entities. With the Constitution of 1974 a new rule of equal representation of all entities on the federal level was introduced. Accordingly, each Republic sent two and each Province one representative to the Federal Constitutional Court.[253]

2. Constitutional adjudication in the SFRY

A. The system of judicial review

The decentralized normative structure of the SFRY faced a relatively developed system of protection of the constitutionality and legality. It encompassed the ordinary and administrative courts, internal controlling systems of the legislature and the administration, as well as the special courts and advocates for the protection of self-management.[254] The main competence to review the compliance of the normative system was awarded to the constitutional courts.

250 Fira, 334; Mratović/Filipović/Sokol, 100 f.; Beckmann-Petey, 162 with further citations in fn. 687.
251 Đorđević, Ustavno pravo, 746 n. 2. Marković, 128.
252 Dimitrijević, 173.
253 Art. 381 Cst. SFRY 1974.
254 Fira, 316.

a) Legal bases

Besides in constitutional provisions[255] the organization and the procedures of the Federal Constitutional Court were regulated by the Law on the Constitutional Court of the SFRY of 21 December 1963[256] and its Rules of Procedure of 22 May 1964.[257] These were replaced by the Rules of Procedure of 27 December 1974.[258] With the enactment of the 1974 Constitution, the CCL was abolished and the legal provisions included into the Constitution.[259] The provisions regarding the republic and provincial Constitutional Courts could be found in the respective Constitutions, Constitutional Courts Laws and the Rules of Procedure.[260] As a consequence of the normative supremacy of the federal law, all provisions concerning constitutional adjudication and review corresponded to those prescribed in the Federal Constitution and the respective Rules to a great extent.[261] Accordingly, only the latter will be taken into consideration in the present study, since the focus is laid on the Federal Constitutional Court.

b) Federal structure

The federal structure of the SFRY mirrored the distribution of the review competences between the Constitutional Courts of the different federal entities. Jurisdictional disputes between the federal units were decided by the Federal Constitutional Court, while conflicts within the Socialist Republics or the Autonomous Provinces remained in the jurisdiction of the Courts of the respective entities. The same division of jurisdiction applied to the system of judicial review. The Federal Court controlled the compliance with the Federal Constitution and laws, while the Constitutional Courts of the Republics and Provinces controlled the adherence with their own constitutional and legal orders.[262] The 1974 Constitution additionally conferred the power to review sub-

255 Art. 241 ff. Cst. SFRY 1963 and art. 375 ff. Cst. SFRY 1974.
256 Službeni list SFRJ 52/1963 (CCL SFRY).
257 Službeni list SFRJ 26/1964.
258 Službeni list SFRJ 66/1974 (RoP SFRY).
259 See hereto BLAGOJEVIĆ, 146 f.; FIRA, 336.
260 With Croatia as example, the legal bases after the federal constitutional reform comprised the Constitution of 1974, Narodne Novine Socijalističke Republike Hrvatske (Official Gazette SR Croatia 9/74, NN SR Croatia), the Statute of the Constitutional Court, NN SR Croatia 22/83 and the Rules of Procedure, NN SR Croatia 29/83.
261 See HÖCKER-WEYAND, 79 f.
262 Art. 248 para. 1 Cst. SFRY 1963 and art. 389 Cst. SFRY 1974.

legislative acts of the federal organs to the Courts of the Republics and Provinces.[263]

As a consequence of the far-reaching autonomy of the Socialist Republics and Autonomous Provinces, their Constitutional Courts were institutionally and functionally independent from the Federal Court. Their decisions could accordingly neither be appealed against nor reviewed by the latter.[264] The independence of these Courts moreover implied that they were not subject to any hierarchical supervision by the Federal Court.[265]

c) Subjection to the communist party system

As a consequence of the decentralized normative powers, the range of acts which could be reviewed by the Federal Constitutional Court was very broad. It comprised all normative acts enacted by state organs – laws, regulations and other general acts passed on the federal, republic, provincial and community level – but also the general acts passed by the numerous self-managing entities.[266] The review competence even comprised working contracts or regulations on pension and social insurances concluded between the organizations of associated work and the individual workers. The decisive factor according to the jurisdiction of the Federal Court and to the prevailing opinion in constitutional doctrine was the normative nature of an act.[267]

On the other hand, the Federal Court refused to review constitutional amendments and constitutional laws, considering them as exclusively political questions reserved to the constitution-making powers.[268] This applied to the Constitutions of the Socialist Republics and Provinces as well. While they could be reviewed by the Federal Assembly, the Federal Court could only give its opinion to the latter, either upon request or upon its own initiative. In accordance hereto, the Constitutional Court of the SR Serbia gave its opinion to the

263 See Expert explanations Cst. SFRY 1974, 550; LAPENNA, 227.

264 FIRA, 337; DIMITRIJEVIĆ, 174; SCHWEISSGUTH, 199. See however MRATOVIĆ/FILIPOVIĆ/SOKOL, 516; ŠINKOVEC/TRATAR, 169.

265 BECKMANN-PETEY, 236; BLAGOJEVIĆ, 78; ĐORĐEVIĆ, Ustavno pravo, 748.

266 Art. 241 paras. 1–3 Cst. SFRY 1963 and art. 375 paras. 1–4 Cst. SFRY 1974.

267 ĐORĐEVIĆ, Ustavno pravo, 758. As to MARKOVIĆ, 138 this excluded mere recommendations, declarations and resolutions.

268 E.g. BLAGOJEVIĆ, 89 f.; ĐORĐEVIĆ, ustavno pravo 754 f.; MARKOVIĆ, 131 f.

compatibility of the constitutional laws of the Autonomous Provinces to the Republic's Assembly.[269]

The Constitutional Courts of the SFRY lacked the core power of their western counterparts: the authority to invalidate unconstitutional laws. As a consequence of the supremacy of parliament in Yugoslav socialist ideology, the Courts were not empowered to directly invalidate laws passed by the assemblies, neither on the federal nor on the republic and provincial levels.[270] Unconstitutional laws only lost their legal validity by force of the Constitutions if the responsible assembly refrained from eliminating the detected unconstitutionality within one year.[271]

Given that the superiority of the assemblies was not undermined, this solution constituted a way of making constitutional review compatible with the communist party system. Although principally approved, the lack of the power of the Constitutional Courts to invalidate unconstitutional laws also met with criticism because of the risk that laws declared unconstitutional remained applicable during the waiting period.[272]

B. Political function of constitutional adjudication

Because of its particular institutional position, constitutional adjudication played a significantly different function in the SFRY than in liberal continental European systems. Although there was no distinct difference with respect to the constitutional foundations and guarantees, both the composition and role of the Yugoslav constitutional courts were in fact dominated by political considerations.

On the one hand, the independence of the Constitutional Courts in the SFRY was merely hypothetical. In fact, the constitutional foundation did not prevent the political elites, and particularly the SKJ, from extending or reducing their competences based on political motivations.[273] While this implied an actual lack of institutional independence, a personal independence of the judges was

269 DIMITRIJEVIĆ, 176; MRATOVIĆ/FILIPOVIĆ/ SOKOL, 512; STJEPANOVIĆ, 58.

270 As to MRATOVIĆ/FILIPOVIĆ/SOKOL, 103 this also prevented the occurrence of legal gaps which would have destabilized the system.

271 The term of six months as provided by art. 245 para. 1 and 2 and 246 para. 1 and 2 Cst. SFRY 1963 was extended to a maximum of twelve months, see art. 384 para. 2 Cst. SFRY 1974.

272 MRATOVIĆ/FILIPOVIĆ/SOKOL, 515; SOKOL, Položaj ustavnih sudova, 153 f.

273 Expert explanations Cst. SFRY 1974, 550.

not realized either. Given the absence of eligibility criteria, political motivations and an affiliation to the leading SKJ dominated the nominations of the judges.[274]

On the other hand, the competences of the Constitutional Courts were determining for their role in the Yugoslav constitutional system. So as to supervise the normative activities and to ensure the supremacy of the Constitution, the Yugoslav Courts were vested with the power to initiate review proceedings at their own discretion.[275] The Courts were moreover assigned powers of a non-judicial nature. These included their competence to permanently monitor the legislative processes, to make suggestions regarding the enactment or amendment of normative acts and to report problems and shortcomings, such as legal loopholes and omissions to legislate to the Assembly.[276] With their constitutionally prescribed obligation to contribute to and promote social progress and development, the Constitutional Courts were obliged to align their decisions with the political program. Therefore, they were perceived as guarantors for the development and the progress of the socialist system rather than as guardians of the constitutional order and values.[277] Because of the predominantly political function, judicial review was an integral component of the Yugoslav political system.[278]

3. Accessibility of the Yugoslav Constitutional Courts

A. Broad accessibility

The Yugoslav Constitutional Courts were considerably more accessible than their counterparts in Western Europe.[279] With the exception of the administrative and executive bodies, principally all state organs of all federal entities were entitled to request the initiation of review proceedings before the Federal Court. Moreover, all self-managing entities, labour organizations and other

274 E.g. Djurišić, 185; Mratović/Filipović/Sokol, 511; Schweissguth, 208, 217 f.

275 Art. 249 para. 2 Cst. SFRY 1963 and art. 387 para. 2 Cst. SFRY 1974. Detailed with respect to the ex officio powers in Marković, 80 f., 146 ff.

276 Art. 242 Cst. SFRY 1963 and art. 376 f. Cst. SFRY 1974.

277 Blagojević, 117; Mratović/Filipović/Sokol, 512.

278 See to this effect Blagojević, 30 f.; Đorđević, Ustavno pravo, 747, 772; Fira, 335.

279 See the long lists of authorized applicants in art. 249 para. 1 Cst. SFRY 1963 and art. 387 para. 1 Cst. SFRY 1974. For a detailed analysis see Marković, 127 ff., 155 ff.

socio-economic associations could file requests for the protection of their rights to self-management.

B. Individual access to Yugoslav Constitutional Courts

Over and above, the Yugoslav Constitutional Courts were accessible to individual persons. As has been shown, these Courts were established as guarantors of the constitutional order in a general interest of society and as promoters of the socialist system. Seen in this context their accessibility to individuals gives rise to the question as to the scope and function of individual access.

Both Federal Constitutions contained extensive catalogues containing human rights and liberties known in Western states and numerous rights related to ethnic affiliation and minorities.[280] Given the strict hierarchy of the Yugoslav normative system, the same rights and liberties were guaranteed on the level of the Republics and Autonomous Provinces. As only subject of international law, the Federation, who acquired full membership in the United Nations in October 1945, ratified the UN Covenants in June 1971 and several international human rights treaties.

At the same time, socialist ideology rejected the concept of individualism based on the primacy of individuals over society and a free individual sphere for personal development. This concept was considered to have paved the way for capitalism and economic dominance of the bourgeoisie. In accordance to Marxist ideology, human rights had a social function and aimed at liberating society from exploitation and submission.[281] This resulted in the equalization of individual and collective goods and interests of society, which was decisive for the legal status of individual persons. As integral parts of society, they were directly addressed by the socialist Constitutions. In contrast to liberal systems, the legal status of individuals was therefore directly limited by the rights and liberties of others and by the constitutional obligations to solidarity and to strive for the welfare of society.[282]

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280 Art. 32–70 Cst. SFRY 1963 and art. 153–203 Cst. SFRY 1974.

281 Detailed to the Marxist conception of rights KLENNER, 793 ff. and PETEV, 28 ff.

282 Art. 32 para. 2, 59 f. and art. 62 Cst SFRY 1963 and art. 153, 173 and 195 ff. Cst. SFRY 1974. For more information, see ĐORĐEVIĆ, Ustavno pravo, 129 ff., 198 f., 362 ff.; FIRA, 275; HÖCKER-WEYAND, 82; LUCHTERHAND, 40 f.; Expert explanations Cst. SFRY 1974, 60, 291; MRATOVIĆ/FILIPOVIĆ/SOKOL, 452.

a) Judicial protection and collective responsibility

The Yugoslav Constitutions provided for a comprehensive system of control and protection of the constitutional rights and liberties and of self-management. It involved the state organs and bearers of public powers as well as all self-managing units in the political and economic field.[283] Besides this system of social control,[284] special institutions such as the public prosecutor and the social attorney for self-management were established with the primary task to protect the constitutional guarantees.[285] Finally, the collective responsibility for the protection of the Yugoslav constitutional guarantees required the active involvement of the individual persons as well.

The judicial protection of the constitutionally guaranteed rights comprised the ordinary and specialized judiciaries such as military courts, criminal courts, commercial courts and, in particular, the courts of self-management on every administrative level.[286] The latter were specialized tribunals whose function was confined to the resolution of disputes arising on the socio-economic field and in self-managing relations. Due to the far-reaching autonomy rights of the organizations of associated work and other socio-economic associations, such issues were extracted from the jurisdiction of the ordinary judiciary.[287]

The judiciary offered comprehensive protection of the constitutional rights and the rights to self-management against decisions and acts of an individual and concrete nature.[288] In 1965, the Law on Administrative Disputes was enacted and contained a general clause for the jurisdiction of the administrative judiciary for violations of constitutional rights and liberties by individual acts.[289] Therewith, all court decisions and any individual or factual act of administrative authorities of the state and social organizations, the presidency and any other executive organ were subject to the control by the supreme courts of the different federal entities.[290] At the same time, the Constitutional

283 See General provisions VIII Cst. SFRY 1963 and IV Cst. SFRY 1974.
284 More detailed in ĐORĐEVIĆ, Ustavno pravo, 257 ff.
285 Detailed in Expert explanations Cst. SFRY 1974, 253 ff.
286 Art. 132 Cst. SFRY 1963 and art. 221 ff. Cst. SFRY 1974.
287 Detailed hereto FIRA, 329 f.
288 Art. 68 Cst. SFRY 1963 and art. 180 Cst. SFRY 1974.
289 Art. 68 para. 1 Law on Administrative Disputes of 10 April 1965, Službeni list SFRJ, no. 21/1965, amended on 24 December 1976 and published in Službeni list SFRJ, no. 4/1977.
290 DIMITRIJEVIĆ, 189; DJURIŠIĆ, 187; ĐORĐEVIĆ, Ustavno pravo, 747; LUCHTERHANDT, 48.

Courts were excluded from reviewing non legislative acts and were restricted to the review of laws and other acts of the legislative authorities.[291]

b) Absence of means of indirect individual access

Individuals in the SFRY did not have a possibility to indirectly access the Constitutional Courts by involving intermediary bodies. Accordingly, no references can be found in the Constitutions or the respective laws to a right to raise objections against the constitutionality of an applicable law in judicial proceedings and to therewith oblige the responsible courts to request the review of this act before the Federal Constitutional Court. Rather, it can be assumed that the courts were free to act at their own discretion.[292] In view of the definition provided above, objections raised in this respect therefore cannot be considered as means of indirect individual access.

The same applies to the social attorney as intermediary body. Introduced by the Constitution of 1974, the social attorney was established as legal representative for the protection of the rights and interests of the workers and their associations. He was entitled to submit requests to the Federal Constitutional Court to initiate review proceedings against acts of legislation and any state act which violated the rights of the working class and social ownership.[293] However, both the systematic placement of the constitutional basis and wording indicate that the social attorney was not responsible for the protection of the subjective rights of the individuals, but rather only of the collective rights of social collectivities and organizations. In this regard, the social attorney cannot be considered as an intermediary body for indirect individual access in accordance to the definition above either.

c) Elimination of the constitutional complaint

Together with the establishment of the Constitutional Courts in 1963, constitutional complaints had been introduced as remedies for direct individual access on all federal levels.[294] In accordance to the Western European model, individuals were entitled to directly appeal to the Constitutional Courts against individual state acts or factual actions which violated their constitutional rights

291 Đorđević, Ustavno pravo, 747.
292 See to this effect also Dimitrijević, 179 and Marković, 88.
293 Art. 387 para. 1 no. 7 Cst. SFRY 1974.
294 For the federal complaint see art. 241 para. 2 Cst. SFRY 1963 and art. 36 CCL SFRY.

and liberties. Corresponding to the federal structure of the Yugoslav constitutional judiciary, the Federal Court decided on alleged violations by individual acts of federal bodies, while the Courts of the Socialist Republics and Provinces decided on infringements by acts of the organs within their own jurisdiction.

The entitlement to file complaints required a personal concern of the applicants and a legal interest in reviewing contested individual acts or decisions.[295] Violations of the rights and liberties listed in Chapter III could be claimed by any individual person. Because of their social nature, violations of the self-managing rights and the other guarantees on the socio-economic sphere listed in Chapter II could only be invoked by the organizations of associated work. In these cases, constitutional complaints had a collective character and were filed for the benefit of the social collectivity.[296] Constitutional complaints had to be submitted within three months and in a form compatible with the formal requirements prescribed.[297]

As its counterparts in Western Europe, also the Yugoslav constitutional complaint had a subsidiary nature. Complaints were namely admissible only if «no other judicial protection is guaranteed».[298] With the adoption of the general clause for the jurisdiction of the administrative judiciary for violations of constitutional rights and liberties by individual acts in 1965, jurisdiction with respect to individual rights protection was however entirely transferred to the Supreme Courts.[299] In practice, the Federal Constitutional Court interpreted the subsidiarity clause and the general clause so rigidly that it rejected all constitutional complaints by referring to the jurisdiction of the administrative judiciary.[300]

The entitlement of individuals to file constitutional complaints thus never gained any practical relevance in the SFRY. With the enactment of the 1974 Constitution this legal remedy was consequently eliminated on the federal and thereafter on the level of the Republics and Provinces. Only the Constitution

295 Art. 37 para. 1 CCL SFRY.

296 DIMITRIJEVIĆ, 190; MARČIĆ, 95; SCHULTZ, 35.

297 Art. 38 ff. CCL SFRY.

298 (*Punctuation added*). Art. 150 para. 2 and 241 para. 2 Cst. SFRY 1963 and art. 36 para. 2 CCL SFRY. For a detailed description of the subsidiarity principle see ĐORĐEVIĆ, Ustavno pravo, 758 ff.

299 See above pp. 52 f.

300 BLAGOJEVIĆ, 96; DJURIŠIĆ, 188; HÖCKER-WEYAND, 79; ROGGEMANN, 85.

of the SR of Croatia still formally provided for this remedy.[301] As the comprehensive jurisdiction of the Supreme Court for individual rights protection prevented the complaint from reaching practical impact also here, it was abolished in 1989 as well.[302] Consequently, individuals did – in practice since 1963 and by law since 1974 – not have any legal remedy to contest individual state acts before the Constitutional Courts for violating their constitutional rights.

4. The right of initiative

Given the absence of indirect access rights and the abolition of the constitutional complaint in 1974, the right of initiative constituted the only means allowing individual access to the Constitutional Courts. Introduced in 1963, it entitled individuals to trigger the initiation of review proceedings against laws and other general acts irrespectively of their application to a concrete case.[303] In accordance with the broad scope of normative acts subject to judicial review, initiatives could be filed against laws, regulations and other general acts on federal, republic and the provincial level as well as all general acts passed by the self-governing entities and associations. The initiative was provided on the federal level and in the Socialist Republics and Autonomous Provinces.[304] Its features are described in the following.

A. Unrestricted accessibility

The right of initiative was not restricted by any personal admissibility criteria nor did it require the fulfilment of procedural requirements. Applicants could submit initiatives against laws or other general acts irrespectively of a personal legal interest or a direct concern. Besides, their entitlement to do so was neither limited in time nor by any financial burden. Finally, the Constitutional Courts even accepted anonymously filed initiatives.[305]

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301 Art. 412 no. 6 Cst. SR Croatia 1974.

302 Amendment LI no. 1 Cst. SR Croatia 1974, BECKMANN-PETEY, 236 f.; ĐORĐEVIĆ, Ustavno pravo, 747; HÖCKER-WEYAND, 79.

303 Art. 249 para. 3 Cst. SFRY 1963 and art. 4 CCL SFRY and art. 387 para. 1 Cst. SFRY 1974.

304 MARKOVIĆ, 157.

305 MARKOVIĆ, 163.

B. Binding effect

As has been shown, proceedings of judicial review could be initiated upon requests filed by state organs and public organizations and upon the submittal of initiatives. As main difference, initiatives did not automatically trigger the opening of review proceedings nor did they oblige the Constitutional Courts to do so. Rather, they constituted a form of information or indication about a detected unconstitutionality or unlawfulness. The Courts decided whether or not to take initiatives into consideration and to review the disputed acts of legislation. If they considered the allegations as founded, they opened the review proceedings based on their power to act *ex officio*.[306]

Nevertheless, the discretion of the Yugoslav Courts in accepting initiatives for consideration was not completely unrestricted. Initiatives had a procedural effect in as far as the Constitutional Courts were obliged to justify their rulings and to state the reasons for rejection. They accordingly had to assess whether or not the allegations gave rise to justified doubts as to the compatibility of disputed provisions with the Constitutions and the laws. Decisions on admission or rejection were adopted in preliminary proceedings and by formal rulings.[307] The rulings on the opening of the main review proceedings indicated the existence of incompatibilities.[308] Hence, in practice, the initiative had a corresponding procedural effect as requests filed by authorized applicants. In contemporary doctrine it is designated as «de facto *actio popularis*» or as binding popular complaint.[309] Yet other authors deny its nature as popular complaint.[310]

C. Protective function

a) Protection of the objective constitutional order

The actual protective function of the initiative becomes apparent by the wording in art. 205 para. 3 Cst. SFRY 1974:

306 E.g. BLAGOJEVIĆ, 79 f.; DIMITRIJEVIĆ, 180.
307 Expert explanations Cst. SFRY 1974, 551.
308 MARKOVIĆ, 148.
309 BLAGOJEVIĆ, 84, 138 and ĐORĐEVIĆ, Ustavno pravo, 752, 770.
310 MARKOVIĆ, 161, 163.

> «It is the right *and the obligation* of the working people and the citizens to take initiative for the protection of the constitutionality and legality» (*Italics added*).

The decentralization of legislative and regulatory authority required a supervision mechanism that comprised the broadest possible circle of applicants for the detection and elimination of legal inconsistencies. The collective responsibility included individual persons as well. Their active involvement in the detection of such inconsistencies and potential threats to the socialist system complied with their constitutionally prescribed responsibility and solidarity towards socialist society.[311] As members of the social and political community, individuals were obliged to file initiatives against incompatible laws and other general acts.[312] Besides, the initiative was also seen as a means of democratic participation.[313] Therewith, the individual citizen was involved in the circle of guarantors of the functioning of the socialist system, along with the Constitutional Courts, the state organs and the entities of self-management.

This indicates that the right of initiative had not been introduced as remedy for individual rights protection.[314] Considering the elimination of the constitutional complaint and the transfer of the jurisdiction on human rights protection to the Supreme Courts, individual access in principle appears to have primarily served the protection of the objective constitutional order. Yet, the adoption of the criteria for recognizing a subjective protective function of popular complaints as specified above,[315] paints a different picture.

b) Combination with personal benefits for the applicants

Notwithstanding their primarily altruistic function, particular procedural measures allowed applicants to gain personal advantages by submitting initiatives to the Constitutional Courts and requesting them to review a law or act of legislation. This enabled them to indirectly achieve the enforcement of their individual rights and to improve their personal legal status.[316] The prospect of

311 MARKOVIĆ, 130; REICHEL, 188 f. See also above p. 51.
312 Expert explanations Cst. SFRY 1974, 205, 353.
313 BLAGOJEVIĆ, 79; ĐORĐEVIĆ, Ustavno pravo, 346; MARKOVIĆ, 80, 163 ff.
314 See also HARTWIG, 543; HÖCKER-WEYAND, 80; LUCHTERHANDT, 48.
315 See above pp. 29 ff.
316 ĐORĐEVIĆ, Ustavno pravo, 747.

personal benefits was considered as incentive to take legal action on behalf of society.[317]

aa) Suspension of enforcement of individual acts

So as to prevent the occurrence of irreparable negative consequences for the applicants, the Constitutional Courts could suspend the enforcement of individual acts passed in application of reviewed laws or acts of legislation for the duration of review proceedings.[318] This allowed applicants to achieve the prevention of the execution of potential rights violating acts already before the adoption of a final decision.

However, such provisional measures entailed a limited protective effect. Firstly, they could only be ordered against concrete acts of application, but not against the general applicability of an unconstitutional law or general act.[319] Besides, the non-applicability of individual acts could not be ordered during the one year period conceded to the Assemblies to eliminate established legal inconsistencies. During this period, laws declared unconstitutional and acts passed in their application remained enforceable.

bb) Appeals for reconsideration or compensation

Besides, applicants who already suffered a violation of their rights because of the adoption of unconstitutional laws or general acts were entitled to claim the reconsideration of final decisions adopted on the basis of unconstitutional laws or general acts.[320] This provided a form of indirect protection of the personal rights against the authorities or courts responsible for the adoption of these acts. The entitlement to request reparation required the abrogation of the normative basis of these decisions. But rather than being restricted to the applicant, it could be claimed by any other individual who suffered violations from the application of the respective law or other general act.[321]

However, appeals for reconsideration or compensation did not have any significance in practice.[322] Without any possibility of extension, appeals could only be submitted within six months from the elimination of the legal basis

317 E.g. Djurišić, 188; Höcker-Weyand, 80. See also Đorđević, Ustavno pravo, 768 ff.
318 Art. 25 para. 3 CCL SFRY and art. 379 Cst. SFRY 1974.
319 Mavčič, Zakon o Ustavnem sodišču, 212.
320 With respect to the Federal Court see art. 388 para. 1 Cst. SFRY 1974.
321 Mratović/Filipović/Sokol, 516.
322 See Crnić, Komentar Ustavnog zakona, fn. 115.

and only if the respective decision was adopted within one year after the adoption of the final individual act.

c) Substitute for missing alternatives of individual access

In practice, the activity of Yugoslav constitutional adjudication was to a great extent caused by the large number of initiatives filed. According to available sources, 75 to 80 percent of all review proceedings before the Constitutional Courts were initiated upon initiatives filed by individuals, labour associations and other self-governing entities.[323] In contrast to individuals and the self-managing entities, the state organs remained inactive in requesting the initiation of judicial review proceedings.[324]

Even though the Yugoslav initiative was primarily introduced for altruistic purposes, it nevertheless served as means for individual rights protection.[325] According to available information, initiatives were predominantly filed by individuals, namely the working people, public employees, invalids and pensioners.[326] These applicants principally alleged violations of socio-economic rights and the rights related to economic self-management.[327] Indicative in this respect is also that initiatives were primarily filed against acts of a lower legislative rank including statutes and other general acts enacted in communities and the self-managing working organizations.[328]

One potential cause for their actual significance as means of individual rights protection in practice is the equation of the subjective and objective interests with respect to the protection of the constitutional guarantees.[329] On the other hand, given their small significance, the procedural means providing applicants with personal benefits do not seem to have had any significant impact in this respect. The fact that initiatives were in practice filed by applicants seeking to improve their own legal position and to protect their personal rights can

323 BLAGOJEVIĆ, 84. See also references in HÖCKER-WEYAND, 81.
324 See MARKOVIĆ, 160.
325 The same conclusion can be found in HÖCKER-WEYAND, 81 ff.
325 BLAGOJEVIĆ, 84.
326 For the practical significance of initiatives see MARKOVIĆ, 158 ff.
327 HÖCKER-WEYAND, 82. For more references see BECKMANN-PETEY, 229.
328 BLAGOJEVIĆ, 84.
329 See to that effect Expert explanations Cst. SFRY 1974, 351 ff.

rather be attributed to the fact that these remedies constituted the only means for individuals to access the Yugoslav Constitutional Courts.[330]

This influenced the practical significance of the Federal Constitutional Court. Concentrating its review activity on the large number of acts enacted by organizations on the socio-economic level, its decisions finally hardly had any political impact.[331] It was accordingly criticized for hiding behind questions of secondary importance for the system.[332] In contrast to their intended function based on socialist ideology, the Constitutional Courts did therefore in fact not reach any substantial significance as promoters of the socialist system but rather as guardians of constitutional rights.[333]

V. Summary and Conclusion

In a first part of this Chapter the different means of granting individuals access to constitutional courts are presented on the basis of practical examples in European states. It is shown that the broader accessibility of constitutional courts to individuals, the stronger the effect on the enforcement of constitutional guarantees. Today, there is widespread agreement that the accessibility of constitutional courts to individual persons considerably extended the protection offered by the judiciary. Owing to the final and generally binding legal force of judgments of constitutional courts, the protective effect reached by the abrogation of rights violating state acts of a legal or factual nature is considerably more extensive. The rights and liberties guaranteed by the constitutions are enforced against the state authorities as subjective rights of the individual applicant and as objective constitutional institutions in a public interest. In postwar Europe, the introduction of individual access rights can thus be regarded as key factor towards an effective rights protection and for the strengthening of the legal positions of individual persons against the state. Therewith, individuals were not only endowed with additional remedies and an extended judicial protection of their rights and liberties, but also with the possibility to

330 The same conclusion can be found in LUCHTERHANDT, 48.

331 E.g. DJURIŠIĆ, 184, 186 ff.; HÖCKER-WEYAND, 81.

332 BLAGOJEVIĆ, 120 ff.; SMERDEL, Kuda ide Ustavni sud Jugoslavije?, 159 f.

333 MARKOVIĆ, 160 f. To this effect see also BAČIĆ PETAR, 395; SMERDEL/SOKOL, 177. This view is not shared by MRATOVIĆ/FILIPOVIĆ/SOKOL, 104.

achieve protection by the constitutional courts as supreme guardians of the constitutional rights and liberties.

In most states the access of individuals to constitutional courts is restricted. As a rule, the entitlement requires a personal impairment by a state act and the demonstration of an own legal interest. Besides, it is restricted by more or less stringent requirements as to the form of applications. In Europe unrestricted access of individuals based on the model of the Roman *actio popularis* can only be found in very few states. In a second part, this Chapter provides a definition and classifies popular complaints as means which entitle individuals to request constitutional courts to review the compliance of laws and other acts of legislation with the constitution.

A third part of Chapter 1 reveals that popular complaints have potential to contribute to the enforcement of constitutional supremacy and the rule of law to a considerable extent. It is shown that – depending of their particular features and the arrangement of the review proceedings – these complaints serve as remedies for the protection of the constitutional order and the constitutionally guaranteed rights and liberties both as common goods and as subjective rights. This view is substantiated by reference to the pertinent jurisdiction of the ECtHR, who under certain conditions acknowledges the applicability of the ECHR standards to judicial review proceedings.

In a final part, the right of initiative in the SFRY is analysed. Established as popular complaint in 1963, it constituted one of the first examples of unrestricted individual access to constitutional adjudication. At the same time, it is the predecessor of the complaints in Croatia, Slovenia and Macedonia as main objects of investigation of the present study. As consequence of the Yugoslav system of self-management the authority to legislate was to a certain extent even granted to enterprises or labour unions. Both the Yugoslav Constitutional Courts and the initiative as means allowing individuals to directly access these courts were intended as mechanisms to ensure the enforcement of the socialist principles and guarantees throughout this comprehensive legal order of the SFRY. The transfer of jurisdiction on individual rights protection to the Supreme Courts and the elimination of constitutional complaints reinforced the function of individual access and the initiative in particular as means of protection of the socialist order in an objective sense. However, this could not prevent that, as only access rights to constitutional adjudication, initiatives were in practice filed by applicants searching for protection of their individual rights and liberties.

It is important to note at this point that, in fact, the Yugoslav Constitution and the laws served as instruments for the enforcement of the socialist program and policy in accordance with the political discretion of the SKJ. In light of this, constitutional adjudication in general and judicial review in particular could only be compatible with the supremacy of the SKJ if they served as instruments of the political powers. Consequently, constitutional courts were considered to be both functionally and institutionally dependent of and subject to the supervision of the SKJ.[334]

To sum up, the first Chapter presents the institutional fundamentals of individual access to constitutional courts in general and of popular complaints, if introduced as means of individual access, in particular. As a general conclusion on unlimited individual access it can be said that, although controversial, it has potential as a strong means both for the enforcement of the constitutionality and for the protection of individual rights and liberties against the political powers.

334 For more details see ŠIMONOVIĆ, 284 ff. and MUKOSKA-ČINGO, 202 f.

Chapter 2: Constitutional adjudication in Croatia, Slovenia and Macedonia

I. Transition to constitutionalism

After the increased efforts of the SKJ to reinforce centralism by the third constitutional reform in 1989,[335] Slovenia and Croatia, who strived for further decentralization and the establishment of a con-federal system within the SFRY, accentuated their intention to abolish socialist rule and to secede from the SFRY by adopting new Constitutions.[336] Attempting to prevent these transformation efforts, the federal forces requested the Federal Constitutional Court to review the compatibility of these Constitutions with the federal law. This effort failed because the Federal Court rejected its competence to review the Constitutions of the Republics.[337] Slovenia and Croatia finally declared their independence from the SFRY on 25 June 1991 and Macedonia on 25 September 1991.[338] On 29 November 1991 the Arbitration Commission of the Peace Conference on Yugoslavia (Badinter Arbitration Commission) proclaimed the dissolution of the SFRY on behalf of the international community.

The fall of socialist rule at the end of the 1980s brought comprehensive political, economic and legal changes to the Successor States of SFRY. With the enactment of new Constitutions these states broke with the systems marked by power concentration, injustice and arbitrariness under the pretext of democratic legitimization of the socialist elites as representatives of the people.[339] While explicitly renunciating from authoritarian rule and concentrated state power, the Constitutions are influenced to a great extent by constitutional standards common to the European community of states. Accordingly also

335 The amendments were published in Službeni list SFRJ, no. 70/1988.

336 Amendments LXIV–LXXV Constitution of the SR Croatia, NN no. 31/90 and Amendments XCI–XCV Constitution of the SR Slovenia, Uradni list 32/1989.

337 With respect to Slovenia see ŠINKOVEC/TRATAR, 170. See also above at Chapter 1, p. 48.

338 More details to the independence processes can be found for Croatia in SMERDEL, Ustavno uređenje Europske Hrvatske, 245 f.; for Slovenia in KRISTAN, ZaöRV 1991, 324 ff.; and for Macedonia in SCHRAMEYER, 411 ff. and WILLEMSEN, 967 ff.

339 ISMAYR, 14; KRISTAN, ZaöRV 1993, 322. A detailed analysis of the transformation in Eastern Europe can be found e.g. in HARTWIG, 449 ff. and ROGGEMANN, passim.

most reforms conducted since were oriented towards the fulfilment of the requirements for accession to the EU.[340] The transformation endeavours comprised the enforcement of human rights and liberties, democracy, equality, justice and the rule of law as basic values of the Union.[341] The Constitutions finally strictly emphasize their normative superiority and binding legal effect over all state organs.

As independent state Croatia enacted its new Constitution on 22 December 1990.[342] Besides a large number of amendments, the Constitution has been subject to comprehensive reforms in 1997, 2000, 2001, 2010 and in 2014.[343] The frequent constitutional amendments can be seen as consequence of the unsteady political developments following the independence and transition and in relation to the adoption of international treaties and the fulfilment of the European legal and democratic standards.[344] The latest amendment was the consequence of the constitutional referendum of December 2013, in which Croatian citizens adopted the definition of marriage as «[u]nion between a woman and a man». New proceedings of constitutional reform on the governmental and administrative structure have been initiated upon a respective proposal of a group of deputies, submitted on 10 July 2013.[345]

340 ROGGEMANN, 72.

341 Art. 2 and 6 and art. 49 Treaty of the European Union, consolidated version of 13 December 2007. The access conditions were moreover concretized by the *Copenhagen Criteria* of 1993 and the *Thessaloniki Agenda for the Western Balkans* of 16 June 2003.

342 Constitution of 22 December 1990, Narodne Novine (Official Gazette, NN) 56/90, 135/97, 113/00, 28/01, 76/10, 85/10, 5/14. Because of unconstitutional numerical changes with the amendment of 2010, NN 85/10, the Constitutional Court established in its notice U-X-1435/2011, n. 14 of 23 March 2011, NN 37/11 that it will continue using the version published in NN 76/10 respectively 5/14. In accordance with legal doctrine and the predominant constitutional and political practice, the present study will nevertheless apply the version published in NN 85/10 respectively 5/14 (hereinafter Cst. Croatia).

343 The English translation of the consolidated text of the Constitution as referred to in this study can be found on <www.sabor.hr/Default.aspx?art=2405> (last accessed September 2018).

344 SMERDEL, Ustavno uređenje Europske Hrvatske, 267. More details to the different reforms can be found e.g. in BAČIĆ PETAR, 371 ff.; SMERDEL, Parlamentarni sustav, 99 ff.; IBID., Ustav nakon ustavnih promjena 2010. godine, 3

345 In October 2013, the National Assembly approved of the suggested reforms, NN 131/13 and adopted a respective draft in December 2013, NN 150/13.

About one year after Croatia, Macedonia[346] adopted its Constitution on 17 November 1991.[347] The Constitution has been subject to seven constitutional reforms and 32 amendments.[348] The most comprehensive reform took place in 2001 in the aftermath of the Peace Agreement of Ohrid which, after seven months of ethnic violence, improved the civil and minority rights of the ethnic Albanians. Noteworthy is the judicial reform adopted in 2005 which aimed at increasing the efficiency and at enforcing the independence of the judiciary from political influences as demand of the accession negotiations with the EU.[349] A new initiative for comprehensive constitutional reforms relating to issues of financial politics, the Judicial Council and to the Constitutional Court, was launched in July 2014 by the Macedonian Government.

Slovenia adopted its Constitution on 23 December 1991.[350] Besides a number of amendments the new Constitution has been subject to six comprehensive reforms to the present day.[351] With the reforms of 7 March 2003, Slovenia included provisions which were indispensable for its accession to the EU in 2004. Therewith it allowed the partial transfer of sovereignty to international organizations by implementing the European extradition agreement and by facilitating the acquisition of real estate by foreign nationals.

It is important to note at this point that with the enactment of the new Constitutions legislation adopted under socialist rule lost its legitimacy in as far as it

346 Ever since its independence from the SFRY, Macedonia has been involved in a political dispute with Greece with respect to its name. Based on a bilateral agreement, these two states agreed on an interim designation as *the Former Yugoslav Republic of Macedonia* (FYROM) as official name in international relations and in relation to the main international organizations and the EU. For a detailed overview see ČOBANOV, 28 f.; SCHRAMEYER, 411 ff. Nevertheless, several states have recognized Macedonia as *Republic of Macedonia* in their bilateral relations.

347 Constitution of 17 November 1991, Služben vesnik (Official Gazette) 52/91. The English translation of the valid Constitution is published on the website of the Constitutional Court <http://ustavensud.mk/wp-content/uploads/2017/10/Constitutuon.pdf> (last accessed September 2018).

348 See Služben vesnik 1/92, revised versions 31/98, 91/01, 84/03, 107/05, 3/09. The consolidated and valid version is published in Služben vesnik 49/11 of 12 April 2011 (hereinafter Cst. Macedonia).

349 SCHRAMEYER, 417.

350 The English translation of the valid Constitution is published on website of the Constitutional Court <www.us-rs.si/en/> (last accessed September 2018).

351 Constitution of 28 December 1991, Uradni list (Official Gazette) 33/91, revised versions 42/97, 66/00, 24/03, 69/04, 68/06, including the last amendments of 24 May 2013, Uradni list 47/13 (hereinafter Cst. Slovenia).

was incompatible with the new constitutional values. Yet, laws and regulations did not lose their legal effect by force of law but continued to be valid in order to avoid legal gaps. Together with the new Constitutions the constitution-makers enacted transitional regulations which determined a transitional period for these acts to be adapted.[352] After the expiry of the set terms for adaptation, the respective laws or regulations became subject to constitutional review.[353]

II. The Constitutional Courts

With their transition Croatia, Slovenia and Macedonia retained their Constitutional Courts and the system of concentrated constitutional judiciary. The strong constitutional position of these Courts is mirrored by their nature as constitutional institutions.

The Croatian Constitutional Court is perceived as organ *sui generis* and as fourth state power with the particular function to control and to protect the constitutional order and guarantees.[354] The Court confirms that it is neither located within the classic separation of powers system nor hierarchically superior to the state powers.[355] The same constitutional position is conceded to the Constitutional Court of Macedonia.[356] Accordingly, also the Macedonian Court is described as state organ *sui generis* that is neither superior nor subordinate to the other state powers.[357]

The Slovene Constitutional Court, on the other hand, is described as

352 See Croatian Constitutional Act on Implementation of the Constitution of 1992, NN 27/92; Constitutional Act on Implementing the Constitution of the Republic of Slovenia of 1991, Uradni list 33/91; Constitutional Law on the Implementation of the Macedonian Constitution of 1991, Služben vesnik 52/91.

353 For Croatia see CRNIĆ, Vladavina Ustava, 20; PEŠUT, 36. With respect to Macedonia, see ČOBANOV, 208, 255 ff.

354 E.g. BAČIĆ PETAR, 385; CRNIĆ, Vladavina Ustava, 3; SMERDEL/SOKOL, 176.

355 E.g. ruling U-I-143/1995 of 14 February 1995, NN 11/95.

356 E.g. KLIMOVSKI/DESKOSKA/KARAKAMIŠEVA, 505; KRAČINSKI, 478 f.; SKARIĆ, 587. ČOBANOV, 143 considers the Court as part of the separation of powers.

357 MUKOSKA-ČINGO, 229 f.

«highest body of the judicial power for the protection of constitutionality and legality and the human rights and liberties».[358]

The Court itself equalizes its function to enforce the rule of law with the judiciary and holds that, as supreme instance of judicial power, it counteracts and prevents abuses or concentration of power.[359] It qualifies failures to implement its judgments as violation of the constitutionally prescribed separation of powers.[360] While in a functional perspective the Constitutional Court appears as part of the judiciary, its autonomy and independence are however explicitly prescribed by art. 1 para. 2 CCA. From an institutional perspective it is thus separated from the judicial power.[361]

Despite the tradition of constitutional adjudication and review their functional transformation constituted a major challenge for the Courts in Croatia, Slovenia and Macedonia. A detailed comparative portrayal of the three Constitutional Courts exceeds the scope of this study. Yet, in order to demonstrate their comparability from an institutional and functional perspective, the legal frameworks and the main powers of these Courts are presented in the following.

1. Legal framework[362]

A. Constitutional Court of Croatia

The basic constitutional provisions for the establishment and the powers of the Croatian Constitutional Court (*Ustavni sud Republike Hrvatske*) can be found in Chapter V. In art. 132 para. 1 the Constitution refers to the Constitutional Law on the Constitutional Court with respect to regulations regarding

358 Art. 1 para. 1 CCA Slovenia.

359 Annual Report 2011, 38; Mavčič, Slovenian constitutional review, 26, 33, 88.

360 Decision U-I-114/1996 of 7 December 1995, n. 9 of Uradni list 8/96, OdlUS IV, 120. From its more recent practice see decision U-I-114/2011 of 9 June 2011, n. 13, Uradni list 47/11, OdlUS XIX, 23.

361 See for more details Cerar, 363 ff.

362 English translations of the relevant legal framework can be found on the websites of the Constitutional Courts.

the proceedings, elections and the mandate of the judges.[363] The internal organization is regulated in the Court's Rules of Procedure passed in 1994.[364] Art. 34 CCL Croatia finally prescribes the subsidiary application of the general procedural rules relevant for the judiciary.

B. Constitutional Court of Slovenia

Besides the constitutional basis in Chapter VIII the procedural and organizational provisions for the Slovenian Constitutional Court (*Ustavno sodišče Republike Slovenije*) are regulated by the Constitutional Court Act.[365] Based on the legislator's entitlement to vest the Court with more powers based on art. 160 indent 11 more relevant provisions can be found in other laws.[366] The Rules of Procedure[367] and other Rules[368] adopted by the Constitutional Court contain regulations on its internal organization and work.

C. Constitutional Court of Macedonia

The constitutional provisions on the Macedonian Constitutional Court (*Ustaven sud na Republika Makedonija*) can be found in Chapter IV. The Constitutional Court enacted its Rules of Procedures directly based on art. 113.[369] There is no law or legislative act regulating the proceedings before the Macedonian Court.

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363 Constitutional Act on the Constitutional Court of 21 March 1991, NN 13/91. After amendments in 1999, the new Constitutional Act in its consolidated and today valid version is published in NN 49/02 (hereinafter CCL Croatia). Despite the prescribed adaptation within one year by the transitory regulations of the Constitutional Amendment Act, NN 121/10, the CCL has not yet been adapted to the Constitution of 2010.

364 Rules of Procedure of 4 March 1994, NN 29/94, revised versions NN 181/03, 16/06, 30/08, 123/09, 63/10, 121/10 (hereinafter RoP Croatia).

365 Constitutional Court Act of 18 March 1994, Uradni list 15/94. The valid version is published in Uradni list 51/07 and the consolidated versions in 64/07 and 109/12 (hereinafter CCA Slovenia).

366 E.g. art. 8 and 50 Law on the National Assembly of 10 September 1992, Uradni list 44/92, 100/05 or art. 5.č, 5.d, 21 Law on Referendum and the Popular Initiative of 8 March 1994, Uradni list 15/94, 26/07.

367 Rules of Procedure of the Constitutional Court, Uradni list 86/07, 54/10, 56/11 (hereinafter RoP Slovenia).

368 Rules of Internal Organization and Administration of the Constitutional Court of 2003, Uradni list 93/03, consolidated version of 56/11.

369 Rules of Procedure of 7 October 1992, Služben vesnik 70/92 (hereinafter RoP Macedonia).

At this point it is to be noted that the therewith granted broad regulatory autonomy to the Constitutional Court is widely discussed.[370] Proponents of the status quo emphasize the independence from the political and legislative authorities.[371] Opponents, on the other hand, criticize the exclusion of the possibility of the legislator to regulate the powers of the Constitutional Court.[372] A first attempt of the Government at amending art. 113 Constitution on the occasion of the comprehensive judicial reform failed because the draft amendment was not adopted by the National Assembly in the final vote on 7 December 2005. A new governmental proposal in this respect has been approved by the Assembly on 23 January 2015.

2. Powers of the Constitutional Courts

A. Basic powers

The broad range of powers to review a comprehensive scope of state acts constitutes a common feature of the three Courts. Their extensive jurisdiction shows their strong institutional position and authority.[373] It furthermore illustrates the significance of constitutional review for the enforcement and protection of the rule of law and of constitutionality and legality as fundamental principles of the new constitutional orders.

Instead of providing general clauses the Constitutions exhaustively enumerate the powers of the Constitutional Courts. While in Croatia and Macedonia these

370 E.g. KRISTAN, OER 1993, 32; TRAJKOVSKA-HRISTOVSKA, Access to Constitutional Justice, 10; TRENESKA-DESKOSKA, Constitutional Court, 16 f.

371 MUKOSKA-ČINGO, 227. See also SHASIVARI, 59; SKARIĆ, 686.

372 KRČINSKI, 480, 485; KRISTAN, OER 1993, 32; SKARIĆ, 687; TRAJKOVSKA-HRISTOVSKA, Control of Constitutionality, 13; TRAJKOVSKA-HRISTOVSKA, Access to Constitutional Justice, 11 ff.; TRENESKA-DESKOSKA, Constitutional Court, 16 f.

373 For Croatia see CRNIĆ, Komentar Ustavnog zakona, 4; For Slovenia see TESTEN, Komentar Ustave art. 160, nn. 1 ff.

competence catalogues can be expanded only by way of constitutional amendments,[374] the Slovene legislator is authorized to extend the competences of the Constitutional Court by law.[375]

a) Judicial review of laws and other general acts

The competence catalogues start with the power of the Constitutional Courts to review the compliance of laws and other acts of legislation with the constitution.[376] This review power constitutes the main activity and the most important function of the three Courts.[377] In contrast to their subordination under socialist rule their position was considerably strengthened by the introduced power to invalidate unconstitutional laws. Today, the significance of this competence is expressed by the great number of legislative acts subject to constitutional review, the broad circle of applicants authorized to request the initiation of proceedings and by the power of the Courts to review acts of legislation at their own discretion. A thorough analysis of the review competence will follow in this and the following Chapter 3 in relation to the accessibility of the Courts in general and the popular complaint in particular.

b) Protection of constitutional rights and liberties

The protection of constitutional rights and liberties is another central function of the Constitutional Courts. All three states reintroduced constitutional complaints as means of direct individual access and therewith entitled individuals to complain against state acts that directly interfere with their legal position.[378] A thorough analysis of this power will follow below in relation to the accessibility of the Constitutional Courts.

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374 Art. 129 indent 10 Cst. Croatia. The Croatian Constitutional Court abolished several laws introducing new competences e.g. by decision U-I-177/2002 of 20 April 2006, NN 58/06. The relevant legal base for Macedonia is art. 110 indent 8 Cst. The Macedonian Court confirmed this fact in U.br.195/2005 of 21 December 2005. All decisions and rulings of the Macedonian Constitutional Court cited in this study are published on the Court's website on <http://ustavensud.mk/?page_id=5228&lang=en>.

375 Art. 160 indent 11 Cst. Slovenia.

376 Art. 129 indents 1–3 Cst. Croatia; art. 160 para. 1 indents 1–5 Cst. Slovenia; art. 110 indents 1 and 2 Cst. Macedonia.

377 E.g. BRUNNER, Festschrift Stern, 1046.

378 Art. 129 indent 4 Cst. Croatia; art. 160 para. 1 indent 6 Cst. Slovenia; art. 110 indent 3 Cst. Macedonia.

c) Resolutions of jurisdictional conflicts

Furthermore, the Constitutional Courts are entitled to resolve conflicts of competences arising between the state powers and to determine by final decision the authority responsible to decide in a specific matter. The Croatian Court is merely empowered to decide on disputes arising between the three branches of state power i.e. the legislative, the executive and the judiciary.[379] In addition to such horizontal disputes the Slovenian and Macedonian Courts also decide on jurisdictional conflicts on the vertical level between authorities of the state and the entities of local self-government.[380]

d) Decisions on the impeachment of supreme state officials

The Constitutional Courts are empowered to decide on the accountability of high state officials and their impeachment for violations of the Constitution in the conduct of their functions. These proceedings are initiated upon requests of the National Assemblies. The Croatian and the Macedonian Courts decide on the accountability of the Presidents of the Republic.[381] The Slovene Court is additionally empowered to control actions and the conduct of the prime minister and of each individual minister.[382]

e) Review of programs and statutes of political parties

The power to review programs and statutes of political parties constitutes a competence common to constitutional courts in Eastern Europe. Accordingly, also the Constitutional Courts of Croatia, Slovenia and Macedonia are entitled to control statutes and political programs of parties with respect to their compliance with the constitutional values and principles of democracy and the rule of law.[383] They are empowered to prohibit political programs or activities or even to ban a political party that aims at the subversion of the constitutional order, the disregard of principles and values, or which calls for violence and incites racial hatred.[384]

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379 Art. 129 indent 6 Cst. Croatia.

380 Art. 160 para. 1 indents 7–9 Cst. Slovenia; art. 110 indents 4 and 5 Cst. Macedonia.

381 Art. 105 para. 3 and 129 indent 7 Cst. Croatia; art. 87 para. 3 and art. 110 indent 6 Cst. Macedonia.

382 Art. 109 and 119 Cst. Slovenia and art. 63 ff. CCA Slovenia.

383 Art. 6 para. 4 and 129 indent 8 Cst. Croatia; art. 160 indent 10 Cst. Slovenia; art. 110 indent 7 Cst. Macedonia.

384 With respect to Macedonia see ČOBANOV, 258 ff.; SKARIĆ, 699.

f) Decisions in electoral disputes

The Constitutional Courts of Croatia and Slovenia are both vested with powers to decide in electoral disputes. As supreme electoral court, the Croatian Court reviews popular referendums and elections and resolves electoral disputes which do not pertain to the jurisdiction of the judiciary.[385] Its Slovene counterpart decides on electoral appeals against decisions of the National Assembly on the confirmation of elections of candidates and on decisions of the Assembly to schedule popular referendums.[386] In contrast, the power to decide on electoral disputes in Macedonia is reserved to the Electoral Commission and the regular judiciary.[387]

B. Particular competences of the Constitutional Courts

As a result of the constitutional reform in 2000, the competences of the Croatian Constitutional Court were extended to a considerable extent. It accordingly decides on the President's immunity, hears the solemn oath, determines the temporary assumption of the presidential office by the speaker of parliament and the termination of the presidential mandate.[388] Furthermore, it decides on appeals of judges against their removal from office, on disciplinary sanctions and on complaints of candidates in judicial elections.[389] Noteworthy is the reintroduction of the competence provided under socialist rule to monitor the implementation of the constitutionality and legality by the state powers, to supervise the execution of the Constitution and the laws and to notify the responsible legislative authorities about detected inconsistencies.[390] Since Croatia's accession to the EU, the Constitutional Court is additionally empowered by art. 145 Constitution to monitor the implementation of the European *acquis communautaire*.

Also the Slovene Court has been vested with additional competences. The most significant is its power to review the compatibility of international treaties with the Constitution before their ratification and to issue a legally binding

385 Art. 129 indent 9 Cst. Croatia.

386 Art. 82 para. 3 Cst. Slovenia.

387 The Macedonian Court accordingly annulled a provision in the Referendum Act providing such a competence, see decision U.br.195/2005 of 21 December 2005, n. 5.

388 Art. 97 para. 2 and art. 106 para. 2 and 3 Cst. Croatia.

389 Art. 123 para. 3 and 4 Cst. Croatia.

390 Art. 129 indent 5 and art. 130 Cst. Croatia. See above at Chapter 1, p. 50.

opinion in this respect.[391] By using this power the Constitutional Court exerted considerable influence on politics when it considered the Association Agreement with the EU to be inconsistent with the former Constitution and therewith prevented its ratification.[392] Consequently, the Court adopts a rigid practice in reviewing treaties prior to their ratification.[393] Furthermore, the legislator empowered the Constitutional Court to issue declaratory decisions on legal loopholes and to oblige the responsible legislative bodies to fill these gaps within a certain period of time.[394] Finally, the Court itself established its own power to issue binding interpretations of laws in order to prevent differences in application.[395]

In addition to the basic powers listed above, the Macedonian Constitutional Court is vested with the competence to confirm the reasons of cessation of the presidential office, to determine the waiver of immunity of the President of the Republic and to approve his or her detention.[396]

III. Accessibility of the Constitutional Courts

Their broad accessibility is another common feature of the Constitutional Courts of Croatia, Slovenia and Macedonia and a further manifestation of their central institutional significance. In all three states this broad accessibility is particularly pronounced with regard to judicial review proceedings. Another common feature is the accessibility to individual persons. In order to analyse the popular complaints in light of these particularities, the following will outline the circle of applicants authorized to request the Constitutional Courts to

391 Art. 160 para. 2 Cst. Slovenia.

392 Opinion Rm-1/1997 of 5 June 1997, Uradni list 40/97 and OdlUS VI, 86. Based on the so-called *Spanish Compromise*, the National Assembly amended the respective constitutional provision and thereby enabled the ratification of the Association Agreement. With respect to bilateral treaties, see opinions Rm-1/2009 of 18 March 2010, Uradni list 27/10 and OdlUS XIX, 12 (English translation available) and opinion Rm-1/2002 of 19 November 2003, Uradni list 118/03 and OdlUS XII, 89 (English translation available).

393 For a detailed description see e.g. NERAD, Komentar Ustave art. 160, nn. 49 f. and 55; ŠKRK, 76 ff.; TESTEN, Komentar Ustave art. 160, nn. 57 ff.

394 Art. 48 para. 1 CCA Slovenia.

395 Detailed in TESTEN, Tehnike ustavnosodnega odločanja, 238 f.

396 Art. 82 paras. 2 and 3 Cst. Macedonia.

review laws and other acts of legislation. In a second step the different remedies allowing individual access to these Courts will be illustrated.

1. Initiation of judicial review proceedings

A. Power to act at their own discretion

As legacy from the SFRY the Constitutional Courts are empowered to initiate review proceedings against laws and other general acts without being requested to do so by authorized applicants. While this ex officio power is extensive in Croatia and Macedonia, the Slovenian Court is much more constrained in this regard.

In art. art. 38 para. 2 CCL the Croatian Constitution states that

> «[t]he Constitutional Court itself may decide to institute proceedings to review the constitutionality of the law and to review the constitutionality and legality of other regulations.»

In practice the Court interprets this competence broadly. It reviews other legal provisions than those challenged if it finds reasons to doubt their compatibility with the Constitution.[397] It also refers to this competence when it initiates incidental review proceedings in relation to constitutional complaints.[398] Finally, the Constitutional Court invokes this legal basis when initiating proceedings without being requested to do so by appeal or in connection to constitutional complaint proceedings.[399] Yet, the Court adopts a rather restrained approach in using its ex officio power against the legislative authorities.

The Macedonian Constitutional Court is vested with a similarly broad ex officio power. While no respective basis can be found in the Constitution it was the Court itself who, by making use of its regulatory authority, introduced its competence to act at its own discretion. Art. 14 RoP accordingly prescribes that

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397 E.g. decision U-I-4113/2008 et al. of 12 August 2014, n. 54, NN 102/14; decision U-I-2414/2011 of 7 November 2012, n. 6, NN 126/12 (English translation available).

398 Crnić, Komentar Ustavnog zakona, 155.

399 E.g. decision U-I-5735/2014 et al. of 12 August 2014, NN 103/14; decision U-I-5991/2012 of 23 January 2013, NN 13/13 (English translation available).

> «[t]he Constitutional Court may itself initiate proceedings for assessing the constitutionality of law or the constitutionality and legality of a regulation or other common act.»

The same provision empowers it to extend the assessment to provisions or other legislative acts that are not contested by an application. So far however, it principally restricted its activity to the requests and initiatives received.[400] It initiated review proceedings on its own initiative in only one single case against a legal provision that introduced its power to decide on electoral disputes.[401]

Contrary to its Croatian and Macedonian counterparts and its predecessor under socialist rule, the Slovene Constitutional Court has no power to initiate or to conduct review proceedings at its own discretion. The Court confirmed this lack of competence itself.[402] By initiating incidental review proceedings, the Slovene Court is to a certain extent authorized to act on its own initiative as well.[403] But in practice also the Slovene Court adopts a restrained approach in exercising this power, restricting it to cases where the assessment of the legal basis is indispensable for deciding on the constitutional complaint.[404] Besides, the Constitutional Court is entitled to deviate from submitted applications and to review legal provisions which have not been contested.[405] This competence is however restricted to provisions that are mutually related and to cases where the extension of the review is necessary to resolve the case.[406]

B. Authorized applicants

In principle the Constitutions list the applicants authorized to request the initiation of judicial review proceedings against laws and other acts of legislation. Pursuant to art. 132 para. 1 Croatian Constitution, the circle of authorized applicants is determined by art. 35 ff. CCL.

In Slovenia, art. 162 para. 2 Constitution delegates the competence to determine who may require the initiation of proceedings before the Constitutional

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400 Trajkovska-Hristovska, Access to Constitutional Justice, 12; Treneska-Deskoska, Constitutional Court, 30.

401 Decision U.br.195/2005 of 21 December 2005.

402 Ruling U-I-169/2008 of 22 October 2009, n. 2 and fn. 1, not published.

403 Art 161 para. 2 Cst. Slovenia and art. 59 para. 2 CCA Slovenia.

404 E.g. ruling U-I-83/2011 and Up-938/2010 of 8 November 2012, n. 19, Uradni list 95/12.

405 Art. 30 CCA Slovenia.

406 For more details see Krivic, Ustavno sodišče, 158 f.

Court to the legislator. With respect to judicial review proceedings, these applicants are enumerated in art. 23, 23a and 24 CCA. As will be shown in the following, the legislator extended the circle of applicants to a considerable extent.[407]

On the other hand, neither the Macedonian Constitution nor the legislator determine the circle of authorized applicants. What is more, not even the Rules of Procedure contain any explicit provisions to this effect. Only art. 12 RoP, as to which «anyone» is entitled to petition the initiation of review proceedings, serves as general clause of the Court's comprehensive accessibility in review proceedings.[408]

a) Supreme political organs

As common to concentrated systems of judicial review, the three state powers are included in the circle of authorized applicants.

In Croatia the President of the Republic is entitled to submit requests if he or she deems that a proclaimed law is not in conformity with the Constitution. The entitlement of the Croatian Government is restricted to normative acts of a sub-legislative nature. Finally, also a group of one fifth of members or an individual committee of the National Assembly is entitled to request the initiation of review proceedings before the Croatian Constitutional Court.

In contrast to its Croatian counterpart, the President of Slovenia has no power to request the initiation of review proceedings before the Constitutional Court. A governmental proposal for constitutional reform suggesting the introduction of a respective entitlement[409] has not been adopted by the National Assembly. The entitlement of the Slovene Government on the other hand, is not limited to normative acts of a sub-legislative nature. Also here, the review of laws can be requested by parliamentary groups comprising one third of deputies and, additionally, by the second chamber, the National Council. Moreover, the Slovene National Assembly as entirety is entitled to request the initiation of review proceedings against acts of a sub-legislative nature which it did not adopt itself.

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407 TESTEN, Komentar Ustave art. 162, n. 20; KAUČIČ/PAVLIN/BARDUTZKY, 33.

408 For a detailed description of this general clause see ČOBANOV, 202 ff.

409 Proposal of the Government of 2009 for the constitutional amendment of art. 160, 161 and 162 of 2009, 15 f.

Also in Macedonia the supreme organs of state can be considered as authorized applicants. In several rulings the Constitutional Court rejected initiatives filed by different organs of state power on the grounds of lack of jurisdiction to review the contested acts of legislation, and not because of the lack of authority of these organs to request the initiation of review proceedings.[410]

b) Judiciary

As consequence of the concentrated review system the right of courts to request the Constitutional Courts to initiate review proceedings is restricted to laws and other acts of legislation which they apply in concrete judicial proceedings.

In Croatia this authority was restricted to the Supreme Court and has been extended to all courts with the reform in 2002.[411] Consequently, every court doubting about the constitutionality of an applicable law is obliged to halt the proceedings and to request the Constitutional Court to review the respective provision. With regard to unconstitutional sub-legislative acts, art. 37 para. 2 CCL entitles courts to refuse to apply these provisions and to base their decisions directly on the pertinent legal basis.

The Slovene Constitutional Court adopts a rigid interpretation in this respect and requires that the contested law must be directly decisive for the decision in the concrete legal dispute at stake.[412] Besides, also here the courts are empowered to refuse to apply unconstitutional sub-legislative acts and to base their decisions directly on the respective legal basis.[413]

The situation in Macedonia is less clear. It is argued that an authorization of courts to request the initiation of review proceedings can be based on the general clause in art. 12 RoP.[414] According to another opinion art. 18 Law on Courts is considered as legal basis for concrete judicial review.[415] Yet, both views are incompatible with art. 110 indent 8 Constitution, which reserves the

410 E.g. ruling U.br.29/2014 of 2 April 2014; ruling U.br.24/2009 of 30 January 2013; ruling U.br.176/2012 of 23 January 2013; ruling U.br.190/2012 of 19 December 2012.

411 See Crnić, Ustavni sud Republike Hrvatske, fn. 6.

412 E.g. ruling U-I-189/2013 of 18 September 2013, nn. 5 f., not published; ruling U-I-41/2013 of 21 March 2013, n. 3, Uradni list 29/13 and 89/13.

413 Testen, Komentar Ustave art. 156, nn. 2 and 3.

414 Treneska-Deskoska, Constitutional Court, 16 f.

415 Skarić, 696; Čobanov, 240.

power to determine the competences of the Constitutional Court to the constitution-makers.[416] Finally, not even the Constitutional Court itself provides a satisfying solution. While the pertinent case-law shows that it accepts for consideration initiatives submitted by courts,[417] its rulings do not reveal whether these submittals were filed in connection with pending legal proceedings or *in abstracto*.[418]

c) Ombudspersons and other public institutions

In all three states the ombudspersons are entitled to request the initiation of judicial review proceedings before the Constitutional Courts. In Slovenia and Macedonia the circle of authorized applicants is extended to other public institutions as well.

In Croatia different ombudsperson offices have been established on the basis of the Constitution.[419] The Croatian ombudsperson is awarded relatively wide powers with respect to legislation.[420] It is authorized to suggest legal changes related to the protection of human rights and to the implementation of international treaties. Based on art. 6 para. 2 Law on the People's attorney the ombudsperson is moreover entitled to request the Constitutional Court to review laws or regulations with respect to their compatibility with the constitutional rights and liberties without any relation to a concrete practical case.

The office of the Slovenian ombudsperson is established in art. 159 Constitution and concretized by the Ombudsman Act.[421] Also the Slovene ombudsperson is granted relatively wide powers to control acts of authorities on the state and the local level and to issue binding recommendations, opinions and critics. It can submit initiatives to the legislative bodies for amending laws and other general acts and request the implementation of international treaties. With the reform of the CCA in 2007 the ombudsperson has been entitled to request the

416 See also KRAČINSKI, 481 f.
417 E.g. ruling U.br.115/2013 of 25 September 2013.
418 See also ČOBANOV, 243 with further references to older rulings in fn. 1206.
419 Art. 93 Cst. Croatia and Law on the People's attorney of 1 October 1992, NN 60/92, current version of 29 June 2012, NN 76/12. The office of the Ombudsperson on Gender Equality and the Children's Right Ombudsperson are regulated by separate laws.
420 PINTARIĆ, 404.
421 Ombudsman Act of 20 December 1993, Uradni list 71/93, 109/12.

initiation of abstract review proceedings against legal provisions which interfere with human rights.[422] With the same reform the Slovenian legislator moreover entitled the Information Commissioner, the Bank of Slovenia, the Court of Audit and the State Attorney General to request the initiation of review proceedings in relation to a concrete legal dispute. Furthermore, the Constitutional Court accepts requests submitted by other public institutions that are not specifically listed, but have an equivalent legal position.[423]

The ombudsperson office of Macedonia was introduced only in 2003.[424] It is entitled to submit initiatives for the evaluation of the constitutionality and legality of laws and other regulations irrespectively thereof whether this question arises in relation to a concrete legal case or not.[425] The general clause for the right to petition the initiation of review proceedings in art. 12 RoP indicates that there is no limitation as to the circle of applicants authorized in this respect either.

d) Organs of local and regional self-administration

Representative bodies of the local and regional entities of self-administration are entitled to request the Constitutional Courts to review laws and other acts of legislation that interfere with their constitutionally guaranteed regulatory autonomy.

In Croatia local and regional self-administration with respect to affairs of local concern is guaranteed as fundamental constitutional principle in art. 4 and as constitutional right of citizens in art. 133. The representative bodies of these entities are entitled to request the initiation of review proceedings.

Local self-government is also guaranteed by the Slovene Constitution in art. 9 and 138 ff. The representative organs of local communities are entitled to request the review of laws and other acts of legislation that contradict with their

422 See NERAD, Komentar Ustave art. 162, n. 16; TESTEN, Komentar Ustave art. 162, n. 9.

423 For a detailed description see TESTEN, Komentar Ustave art. 162, nn. 10 f; KAUČIČ/PAVLIN/BARDUTZKY, 35. See for many ruling U-I-224/96 of 22 May 1997, nn. 8 ff., Uradni list 36/97 and OdlUS VI, 65.

424 Ombudsperson Law of 1 October 2003, Služben vesnik 60/03.

425 Art. 30 para. 2 Ombudsperson Law. See also ruling U.br.58/2002 of 19 June 2002.

regulatory autonomy.[426] The relevant practice of the Court however reveals a rigid interpretation of the admissibility requirements for such requests.[427]

Also the Macedonian Constitution guarantees local self-government as fundamental constitutional value in art. 8 indent 9 and as constitutional right of the citizens in art. 114. The mayors and communal councils are entitled to request the initiation of review proceedings.[428]

e) National trade unions and organizations of social interest

The authorization of trade unions to request the initiation of judicial review proceedings can be considered as a particularity of the Slovene system of constitutional adjudication. Yet, the pertinent case-law of the Constitutional Court reveals a rigid interpretation in this regard.[429] This primarily applies to the quality of authorized trade unions.[430] Furthermore, the Court recognizes their entitlement only with respect to legal provisions which regulate the conditions of labour, the legal position of employees or their social rights[431] but not with respect to general allegations or to cuts of pensions or annual allowances.[432]

In contrast to Slovenia neither Croatian trade unions nor any other organizations of social interest are authorized to request the initiation of judicial review proceedings before the Croatian Constitutional Court.

On the basis of the general clause in art. 12 RoP the circle of social organizations as authorized applicants before the Macedonian Constitutional Court is in principle unlimited.

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426 Art. 91 Law on Local Self-Administration of 21 December 1993, Uradni list 94/07, 76/08, 79/09.

427 See e.g. ruling U-I-303/2002 of 25 September 2002, n. 4, OdlUS XI, 194.

428 Art. 87 Law on Local Self-Administration of 29 January 2002, Služben vesnik 5/02.

429 See also TESTEN, Komentar Ustave art. 162, n. 19.

430 It for instance rejects requests filed by trade unions of public employees see ruling U-I-152/2013 of 13 June 2013, n. 3, not published. See for many also decision U-I-101/1995 of 8 January 1998, n. 2, Uradni list RS 13/98 and OdlUS VII, 2 (English translation available).

431 E.g. ruling U-I-163/2010 of 10 November 2011, n. 4, not published.

432 See for many ruling U-I-300/2013 of 5 March 2015, n. 5, not published; decision U-I-65/2008 of 25 September 2008, n. 6, Uradni list 96/08 and OdlUS XVII, 49.

2. Individual access to the Constitutional Courts

With their transition Croatia, Slovenia and Macedonia reintroduced the broad accessibility of their Constitutional Courts to individuals. While most European systems limit individual access to constitutional complaints, one can establish a number of means allowing indirect and direct individual access in the three states considered. In an international perspective a comparably broad accessibility of constitutional adjudication to individual persons is difficult to find. The means of individual access provided in the three states considered will be presented in the following. Thereby, the parallelism of direct individual access to constitutional adjudication by popular complaints and by constitutional complaints deserves particular attention. While the procedural aspects of the popular complaints will be described in detail in the following Chapter, this part of the study presents the procedural arrangements of the constitutional complaints.

A. Individual access to the Croatian Constitutional Court

a) Means of indirect individual access

aa) Objection of unconstitutionality

While all Croatian courts must refer to the Constitutional Court if they doubt the constitutionality of legal provisions which they apply in litigations, individuals who participate in these proceedings can in principle raise objections against the constitutionality of these provisions as well. Given that there is no provision prescribing a binding effect of such objections, the courts are in principle not obliged to refer to the Court upon such objections.[433] However, the constitutional obligation of the judiciary to comply with and to judge on the basis of the Constitution implies a committal effect of such objections. Accordingly, the courts are obliged to establish whether objections made are justified. This is also supported by claims of the former President of the Constitutional Court who requires the introduction of a provision which explicitly prescribes the binding effect of such objections.[434]

433 KRAPAC, Postupak pred Ustavnim sudom, n. 25.

434 See OMEJEC, O potrebnim promjenama, 100.

bb) Appeals to the ombudsperson

As has been shown in the previous paragraph the ombudsperson is authorized to request the Constitutional Court to review laws and other general acts with respect to their compatibility with the constitutionally guaranteed rights and liberties. The impetus to file such a request can be given by an individual person who calls the ombudsperson's attention to a respective incompatibility of an act of legislation. If the ombudsperson refers to the Constitutional Court upon such an appeal, it functions as intermediary body allowing individuals to indirectly access the Constitutional Court.[435]

On the other hand, the ombudsperson is not entitled to submit constitutional complaints against individual acts of administrative organs or against court decisions. The personal nature of this remedy prevents the ombudsperson to refer to the Constitutional Court on behalf of someone else. Only the individual or legal person concerned is entitled to access the Court after exhausting all available remedies before the ordinary judiciary. The requirement of a personal and direct legal concern for the admissibility of constitutional complaints is described hereinafter.[436]

b) Means of direct individual access

aa) Right to request the resolution of jurisdictional conflicts

Direct individual access to the Croatian Constitutional Court is also provided in cases of jurisdictional conflicts. Art. 81 f. CCL accordingly entitles individual persons to request the initiation of proceedings in order to resolve jurisdictional conflicts between the legislative, the executive and the judicial branches.[437] Applicants must prove that they are directly concerned and have a legal interest in the resolution of the conflict between the state bodies. Such a concern is normally given if applicants are parties to judicial or administrative proceedings and if their rights are interfered with because of a dispute regarding the jurisdiction of these authorities. Requests must be submitted within 30 days from the day of knowledge about such a dispute.

As a means of direct individual access the right to request the resolution of jurisdictional conflicts only plays a small practical role as requests filed are

435 See also KRAPAC, Postupak pred Ustavnim sudom, n. 25.
436 See below p. 94.
437 See also KRAPAC, Postupak pred Ustavnim sudom, n. 28.

mostly rejected as inadmissible. As example, applicants often fail to demonstrate the existence of a jurisdictional dispute.[438]

bb) Absence of electoral complaints

In 2013 the Constitutional Court was requested to assess the constitutionality of the popular referendum on the adoption of a constitutional provision defining marriage as a lifelong union between a man and a woman. The requests were filed by individuals and societal associations but were rejected by the Court for the lack of a right to file electoral complaints.[439] Therewith the Constitutional Court confirmed its position which it expressed in an earlier ruling where it rejected a proposal against the referendum question on the accession of Croatia to the EU. It clarified that the entitlement to file electoral complaints is reserved to political parties, candidates standing for election or to groups of citizens comprising at least 100 persons entitled to vote and not smaller than five percent of the voters of the constituency in which elections are held.[440]

c) Direct access by constitutional complaints

After it had been abolished in 1989 the constitutional complaint was reintroduced with art.129 para. 4 Constitution in 1991. Accordingly

> «[e]veryone may lodge a constitutional complaint with the Constitutional Court if he deems that the individual act of a state body, a body of local and regional self-government, or a legal person with public authority, which decided about his/her rights and obligations, or about suspicion or accusation for a criminal act, has violated his/her human rights or fundamental freedoms guaranteed by the Constitution, or his/her right to local and regional self-government guaranteed by the Constitution.»[441]

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438 E.g. ruling U-IV-4408/2010 of 2 December 2014, n. 5, not published; ruling U-IV-2820/2007 of 16 February 2010, n. 5, NN 28/10; ruling U-IV-383/2004 of 25 February 2004, n. 5, NN 27/04.

439 Rulings U-VIIR-5328/2013 of 14 November 2013 and U-VIIR-5520/2013 of 28 November 2013, not published.

440 Rulings U-VII-72/2012 et al. of 16 January 2012, NN 11/12.

441 Art. 62 para. 1 CCL Croatia. With respect to the terminology see CRNIĆ, Komentar Ustavnog zakona, 161; KRAPAC, Postupak pred Ustavnim sudom, fn. 80.

Despite its constitutional basis, the Constitutional Court states that the constitutional complaint does not constitute a constitutional right of the individuals.[442] In permanent practice it defines it as institution *sui generis* and as «[a] particular constitutional instrument for the protection of the constitutional rights in individual cases.»[443]

aa) Objects of complaint

Constitutional complaints can be filed against individual acts that directly interfere with the rights and liberties of the applicants. Laws and other acts of a general nature are excluded as objects of complaint.

The relevant provisions do not specify which individual acts can be contested. Rather, the respective criteria have been developed by the Constitutional Court. It accordingly requires such an act to directly interfere with the legal position of the persons addressed by regulating their rights, liberties or duties, or containing suspicions or criminal charges.[444] Initially, the Court did not accept for consideration complaints that were filed against the conduct or factual actions of state and public bodies.[445] Because this prevented complaints filed against conditions in Croatian prisons, Croatia was condemned by several judgments of the ECtHR for violating the prohibition of torture and of inhumane and degrading treatment and the right to an effective legal remedy.[446] In accordance to the current practice of the Constitutional Court complaints can be filed against any decision, individual act or action which directly impacts on the legal position of the applicants. Accordingly, it rejects complaints against rulings on the admissibility of appeals.[447]

bb) Scope of protection

Constitutional complaints can be filed for the protection of the constitutionally guaranteed human rights and fundamental liberties and for the protection of

442 See LJUBIĆ, Ustavnosudska zaštita, 2. In its study, the author offers a comprehensive analysis of the Croatian constitutional complaint.

443 See for many ruling U-III-6382/2010 of 12 May 2011, n. 5, NN 63/11.

444 For a detailed analysis of the extensive relevant case-law see CRNIĆ, Komentar Ustavnog zakona, 171 ff.; KRAPAC, Postupak pred Ustavnim sudom, n. 58.1.

445 KRAPAC, Pretpostavke za pokretanje i vođenje, 180.

446 See e.g. judgments *Pilčić vs. Croatia,* 33138/06, 12 January 2008, §§ 30 and 33 ff.; *Štitić vs. Croatia*, 29660/03, 8 November 2007, § 28.

447 E.g. ruling U-III-7119/2014 of 8 December 2014, n. 3, not published.

the right to local and regional self-government.[448] As consequence of an overly broad interpretation in the beginning years of its activity the Constitutional Court was heavily overburdened.[449] Furthermore, it did not succeed in clearly delimiting its own jurisdiction from the judiciary.[450]

In 2000 the Constitutional Court restricted the interpretation of constitutional rights to the human rights and liberties guaranteed in Chapter III.[451] During the following years it restricted the scope of protected rights even further. Today, it acknowledges violations of the fundamental constitutional guarantees such as the principle of proportionality, the right to equality or the rule of law only in relation to the violation of another constitutional guarantee.[452] In relation to social and economic rights or the right to property and of ownership, it invokes the wide discretion of the legislator in implementing these guarantees and, consequently, to the jurisdiction of the judiciary.[453]

cc) Personal requirements for access

Primarily only applicants with the capacity to act can file constitutional complaints.[454] Additionally, the entitlement is predicated on a personal legal interest of applicants in bringing proceedings before the Constitutional Court.

In the first place this restricts access to applicants who are entitled to the rights or liberties they claim to be violated. Legal persons can only claim violation of rights they are entitled to in accordance with their legal nature. The circle of applicants comprises entities of local and regional self-government against violation of their autonomy rights. In analogy to the rules in civil and administrative procedures, it moreover comprises associations or citizen groups without legal subjectivity if their entitlement is justified by the legal subject

448 For a detailed analysis of communal complaints see KRAPAC, Postupak pred Ustavnim sudom, n. 69.

449 E.g. BAČIĆ PETAR, 417 f.; KRAPAC, Postupak pred Ustavnim sudom, n. 52.3.

450 For a detailed discussion in this regard see KRAPAC, Pretpostavke za pokretanje i vođenje, 191 ff.

451 Decision U-III-1125/1999 et al. of 13 March 2000, n. 17, NN 38/00. For a detailed description of this change of practice see e.g. BELAJEC, 100 f., 102 ff.

452 See for many decision U-III-3846/2012 of 10 September 2013, n. 9, NN 120/13; decision U-III-1458/2013 of 6 May 2013, n. 6, NN 58/13.

453 E.g. ruling U-III-6382/2010 of 12 May 2011, n. 5, NN 63/11; decision U-IIIB-1373/2009 of 7 July 2009, n. 8, NN 88/09 (English translation available). For a presentation of the case-law see KRAPAC, Postupak pred Ustavnim sudom, nn. 39.4 and 62.6.

454 Detailed in KRAPAC, Postupak pred Ustavnim sudom, n. 56.2.

at stake. The Constitutional Court for instance confirmed a violation of the right to remedy of a group of tenants of a residential building who were not given the possibility to participate before the administrative court.[455] Given their lack of capacity to hold constitutional rights state organs or bodies are excluded from filing constitutional complaints.[456] Yet, it is claimed that also these bodies can file constitutional complaints if they conduct a commercial activity as economic subjects and are affected to the same extent as persons of private law.[457]

To prove their legal interest applicants must demonstrate a personal and direct concern, either for being personally addressed by an individual administrative act or as a party to proceedings in which a contested decision has been adopted.[458] Accordingly, constitutional complaints can only be submitted for the protection of the personal rights and not on behalf of a third person or in a general interest. Legal representatives acting in the name and on behalf of clients must present explicit authorizations for the actions they undertake.[459] The Constitutional Court consequently rejected a complaint filed by minority organizations for the protection of the rights of members of the minority group.[460]

The strictly personal nature of constitutional complaints is finally evident in art. 79 CCL. This provision obliges the Constitutional Court to end the proceedings if complaints are withdrawn and to terminate them if the complainant dies or a legal person is dissolved. It accordingly refuses to continue proceedings on behalf of legal successors unless they demonstrate a personal legal interest in bringing the proceedings.[461]

dd) Formal requirements for access

Also the Croatian constitutional complaint is provided as a subsidiary means of judicial protection. Applicants are obliged to exhaust all available legal remedies before they file complaints to the Constitutional Court. An appeal

455 Decision U-III-771/1994 of 3 April 1995, NN 26/95.
456 E.g. ruling U-III-4845/2004 of 3 October 2006, n. 4, NN 114/06.
457 CRNIĆ, Komentar Ustavnog zakona, 169 with further references in fn. 124.
458 KRAPAC, Postupak pred Ustavnim sudom, n. 60.
459 Art. 24 CCL Croatia.
460 Decisions U-I-1029/2007 and U-I-1030/2007 of 7 April 2010, nn. 5 f., NN 47/10.
461 See for more details CRNIĆ, Komentar Ustavnog zakona, 164 f., 298, 300 f.

must accordingly be rejected by final decision of the Supreme Court as supreme judicial instance.[462] The subsidiarity requires the exhaustion of all available remedies at due diligence, at due date and in compliance with the formal and substantial conditions. Applicants must have brought the substantial issues and relevant facts to the attention of the lower courts, so as to enable them to provide judicial protection of the alleged violations.[463] With the adoption of the CCL in 2002 the Croatian constitution-makers introduced two types of constitutional complaints which can be filed prior to the exhaustion of available legal remedies in exceptional cases.[464] Not least as a consequence of its severe overload and the excessive number of complaints received, the Constitutional Court adopts a rigid interpretation of the subsidiarity principle.[465] Because it rejected a complaint even though proceedings before the Administrative Court had been erroneously discontinued, the ECtHR blamed the Constitutional Court's practice for violating the right to access to court.[466]

Furthermore, art. 64 CCL prescribes a relatively short term for the submittal of complaints. While these must be filed within 30 days from the day a final individual act has been received, late submissions can exceptionally be allowed on the basis of justified grounds. Health reasons are for instance not recognized as justified grounds.[467] Because the Constitutional Court rejected a complaint based on an erroneous calculation of time, the ECtHR condemned Croatia also in this regard.[468]

The submittal of constitutional complaints does not involve any financial burden for applicants. Because the proceedings before the Croatian Constitutional Court are as a principle free of charge and do not require the representation by attorneys of law, the submittal of complaints is neither contingent on the payment of court fees nor on additional costs for legal representation. On the basis

462 E.g. ruling U-III-2085/2011 of 10 July 2014, n. 7, NN 97/14.

463 See Ljubić, Ustavnosudska zaštita, 1. For a detailed description of the subsidiarity principle see Krapac, Postupak pred Ustavnim sudom, nn. 53 f.

464 For more details hereto see Crnić, Uloga Ustavnog suda u zaštiti temeljnih prava, 5 f.; Krapac, Postupak pred Ustavnim sudom, nn. 67 f.; Ljubić, Ustavnosudska zaštita, 4 ff.

465 Ljubić, Ustavnosudska zaštita, 8. See e.g. notification U-X-835/2005 of 24 March 2005, n. 3, NN 30/05 (English translation available).

466 Judgment *Peruško vs. Croatia*, § 56.

467 Ruling U-III-2230/2014 of 10 June 2014, n. 4, not published.

468 *Čamovski vs. Croatia*, 38280/10, 23 October 2012, §§ 38 ff., 43.

of art. 80 CCL and as a financial deterrence from misuses and malicious submittals, the Court is entitled to order unsuccessful complainants to reimburse intentionally caused expenses.

Finally, the CCL prescribes requirements as to the form and substance of constitutional complaints. Based on art. 17 f. complaints must be written and filed in official Croatian language and Latin script. As to art. 65 para. 1 they must contain the complete identification of the complainant, the contested individual act, the rights deemed to be violated, as well as evidence of the exhaustion of remedies and of the submittal of the complaint in due time. So as to facilitate the compliance with the formal procedural requirements, the Court published a template with detailed instructions in Croatian language on its website.[469]

As a measure to decrease its workload the Constitutional Court adopted a rigid approach with respect to the substantiation of constitutional complaints.[470] Complainants must accordingly substantiate that their rights have been violated either through the conduct of lower courts or instances in the proceedings or through the adoption of arbitrary interpretations.[471] While this restrictive practice did not diminish the amount of complaints submitted, the President of the Constitutional Court nevertheless considered that it helped to reduce the number of cases pending before the Court.[472]

B. Individual access to the Slovene Constitutional Court

a) Means of indirect individual access

aa) Objection of unconstitutionality

Also the Slovene courts, who doubt about the constitutionality of laws which they apply in litigations, are obliged by art. 156 Constitution to halt ongoing proceedings and to request the initiation of review proceedings before the Constitutional Court.

469 <Www.usud.hr/sites/default/files/dokumenti/OBRAZAC_USTAVNE_TUZBE.pdf> (last accessed September 2018).

470 See detailed description of the practice at MARKOVIĆ/TRGOVAC, 1 ff.

471 E.g. ruling U-III-1398/2009 of 30 November 2009, nn. 4 ff., NN 158/09; ruling U-III-1747/2009 of 10 November 2009, n. 6, NN 139/09.

472 See OMEJEC, Promjene u postupanju, 1 f.

In accordance with the regulations in Croatia there are no constitutional or legal provisions prescribing a committal nature of objections raised by parties to these proceedings which oblige the courts to proceed in this way.[473] Initially, the Constitutional Court rejected a respective obligation of the courts.[474] In order to ease the own workload and to reinforce the awareness of its subsidiary role in protecting the Constitution and the laws, it significantly changed its practice in 2007. It emphasized that judges are not free to decide whether or not to consider substantiated arguments and to ascertain allegations about the inconsistency of laws with the Constitution. This obligation to take notice of justified arguments of a party and to assess its justification is derived from the constitutional guarantees of judicial protection.[475]

On the basis of the definition above objections are thus to be considered as means of indirect individual access to the Constitutional Court of Slovenia.

bb) Appeals to the ombudsperson

As has been shown, the Slovene ombudsperson is entitled to request the initiation of review proceedings against laws or regulations that are incompatible with human rights and liberties. Respective requests can be submitted on the own initiative or upon an according hint or appeal by an individual person. Acting on behalf of the latter the ombudsperson can be considered as intermediary body allowing indirect individual access the Constitutional Court.

The Slovene ombudsperson moreover allows indirect individual access by filing constitutional complaints against decisions or individual acts of the judiciary and the administration on behalf of a person concerned.[476] The constitutional complaint accordingly constitutes a legal remedy enabling individuals to directly access the Constitutional Court and, at the same time, to achieve protection of their rights by way of an indirect access through the ombudsperson.[477]

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473 MAVČIČ, Slovenian constitutional review, 68; TESTEN, Komentar Ustave art. 156, n. 6.

474 E.g. ruling Up-70/96 of 22 May 1996, n. 4, OdlUS V, 197.

475 Ruling U-I-275/2006 and Up-811/2007 of 29 May 2008, n. 12, Uradni list 62/2008, OdlUS XVII, 21.

476 Art. 50 para. 2 CCA Slovenia.

477 See also HARUTYUNYAN/NUSSBERGER/PACZOLAY, n. 70.

cc) Indirect access through national representative trade unions

It has been shown that in Slovenia national representative trade unions are listed among the authorized applicants in judicial review proceedings.[478] Although acting in their own name when filing requests, their entitlement to access the Constitutional Court does not serve the protection of their own legal position and rights. In emphasis of the social state principle these unions are entitled to act as legal representatives of the employees of individual activities or professions. The Court clearly restricts their authorization to contest acts of legislation on behalf of and in the interest of employees and for the protection of their employment status and social position.

From the perspective of employees, who are represented by national trade unions, the latter can be considered as intermediary bodies allowing them to indirectly access to the Constitutional Court.

b) Means of direct individual access

In sentence 2, art. 162 para. 2 Constitution determines that

> «[a]nybody who demonstrates legal interest may request the initiation of proceedings before the Constitutional Court.»

This constitutional provision can be interpreted in two ways. It can be understood as intention of the constitution-makers to guarantee access for everyone with a legal interest on a constitutional basis. Conversely, it can be interpreted as constitutionally declared restriction of the accessibility of the Constitutional Court to individuals who seek protection of their own rights and liberties.[479] Already in the first years of its activity the Constitutional Court passed a fundamental judgment, which can be considered as leading case with respect to individual access. It accordingly stated that

> «[i]n all cases, in which proceedings are initiated by individuals according to the CCA, their entitlement is tied to the protection of their rights».[480]

It emphasized this general requirement for individual access by explicitly enumerating the single individual access rights to which this applies, namely the initiative pursuant to art. 24 CCA, the constitutional complaint, petitions in

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478 See above at pp. 79 f..

479 The legal interest as requirement for the admissibility of petitions will be looked at thoroughly in the following Chapter, pp. 142 ff.

480 Ruling Mp-1/1996 of 12 December 1996, n. 7, OdlUS V, 213.

jurisdictional disputes and petitions to review acts and actions of political parties.

aa) Right to request the resolution of jurisdictional disputes

Pursuant to art. 61 para. 3 CCA individual persons are entitled to file petitions to the Constitutional Court requesting it to resolve jurisdictional disputes. The entitlement comprises disputes between state organs on a horizontal and on a vertical level, both if one and the same competence is claimed by two or more organs or bodies (positive disputes) or if no state organ or body acknowledges its responsibility in a certain field (negative disputes).[481]

The right to file petitions requires the fulfilment of procedural requirements. Firstly, the petitioner must demonstrate the existence of a jurisdictional dispute.[482] In practice the Court frequently rejects petitions for not meeting this requirement.[483] Furthermore, only applicants who are involved in proceedings in which a dispute arose are entitled to file petition.[484] This finally complies with the leading case stated above, as to which direct individual access to the Constitutional Court is reserved to the protection of own rights. If a jurisdictional dispute and the entitlement of the applicant are given petitions must be filed within 90 days from the day on which the disputes arose.

bb) Petition to review acts and activities of political parties

Unlike in Croatia, where only state authorities are empowered to request the Constitutional Court to control the compatibility of statutes and programs of political parties with the Constitution, the Slovene legislator extended the circle of applicants to individual citizens. Based on art. 68 para. 1 CCA

> «[a]nyone may lodge a petition […] to review the unconstitutionality of the acts and activities of political parties.» (*Punctuation added*)

Its accessibility in this respect and its role as guardian of the constitutional rights and liberties put the Constitutional Court in a difficult position. In deciding whether or not to initiate proceedings and to prohibit acts of political parties, it must at the same time take into consideration the serious interference

481 E.g. ruling P-17/2011 of 7 June 2012, n. 2, not published.

482 NERAD, Komentar Ustave art. 160, n. 58.

483 See ruling P-15/2009 of 16 December 2012, n. 2, not published; ruling P-17/2011 of 7 June 2012, n. 4, not published; ruling P-2/2011 of 6 July 2011, n. 2, not published.

484 Ruling P-18/2011 of 15 June 2012, n. 3, not published.

with the rights of the political parties. In permanent practice it therefore adopts a very restrained approach in accepting requests to review acts of political parties. It accepts such petitions only with respect to a limited circle of acts while setting high requirements to the substantiation and to the entitlement to file them.[485] Besides, it requires a high level of tolerance of activities and acts of political parties and emphasizes that mere denials or contradictions to constitutional values do not suffice. Rather, petitioners must demonstrate that with the contested acts or actions a party aims at destroying or disrupting the constitutional order and that it threatens the fundamental values of a free democratic society.[486]

With respect to the right to file petitions and to the necessity of a personal legal interest there are different views in legal doctrine and practice. As to one opinion every citizen in a democratic society has an interest in the compliance of behaviours and actions of political parties with the constitution, irrespectively of a personal affection.[487] Others hold that the legislator did not intend to allow unrestricted access to an activity of the Constitutional Court that interferes with constitutional rights of political parties.[488] The Court confirms this view and requests a direct and concrete legal interest and the demonstration of an improvement of the own legal position by the abrogation or prohibition of the act or the party itself.[489] Therefore, the Constitutional Court frequently rejects petitions filed against political parties.[490]

cc) No individual access to proceedings on electoral disputes

Neither the Constitution nor the CCA entitle individuals to request the Court to review decisions of the National Assembly in relation to the scheduling of popular referendums. Pursuant to art. 5č para. 2 Referendum Law, the entitlement is restricted to the submitter of a referendum request. The same applies

485 E.g. ruling Ps-1/2012 of 8 November 2012, n. 3, not published; ruling U-I-184/1997 of 10 February 2000, n. 2, OdlUS IX, 22.

486 Decision Up-301/1996 of 15 January 1998, n. 15, Uradni list 13/98 and OdlUS VII, 98 (English translation available).

487 See dissenting decision of judge Matevž Krivic to ruling Mp-1/1996 of 12 December 1996, n. 5, above at fn. 480. See also Krivic, Ustavno sodišče, 5; Mavčič, Slovenian constitutional review, 64.

488 Testen, Komentar Ustave art. 160, nn. 47 f.

489 See ruling Ps-1/2003 of 1 April 2004, n. 3, not published; ruling Ps-1/2000 of 15 June 2000, n. 2, OdlUS IX, 166.

490 See Testen, Komentar Ustave art. 160, n. 42.

to electoral appeals against decisions of the National Assembly on the confirmation of elections of candidates, where pursuant to art. 69 CCA, the entitlement is restricted to the candidates standing for election.

The Constitutional Court confirms its limited accessibility in electoral disputes and requires a legal interest of the applicants and a prospect to improve the personal legal position.[491] In the above cited leading case on direct individual access it accordingly rejected complaints of candidates from the socialist party who contested the confirmation of the mandates of another party by the Assembly.[492] For the same reason it rejected a complaint of a candidate who was not elected as deputy and could not demonstrate that his legal position would be improved by the decision of the Constitutional Court.[493]

c) Direct access by means of constitutional complaints

After its abolition in 1974 the Slovene constitutional complaint was reintroduced in art. 160 para. 1 indent 6 Constitution in 1991. Accordingly

> «[t]he Constitutional Court decides on constitutional complaints stemming from the violation of human rights and fundamental liberties by individual acts».

In absence of regulations of the conditions and procedures, this legal remedy remained inoperable until the adoption of the CCA in 1994. Despite its constitutional basis, the constitutional complaint is not regarded as constitutional right. Instead, and in accordance to its Croatian counterpart, the Slovene complaint is defined as legal remedy *sui generis* and as procedural right which entitles individuals to request the protection of rights and liberties from violations by the state.[494]

aa) Objects of complaint

According to art. 50 para. 1 CCA constitutional complaints can be submitted against individual acts adopted by the state authorities, local community au-

491 Ruling Mp-1/2007 of 17 January 2008, n. 10, Uradni list 15/08 and OdlUS XVII, 4.
492 Ruling Mp-1/1996, nn. 5 ff., above at fn. 480.
493 Ruling Mp-3/2007 of 21 February 2008, nn. 2 f., not published.
494 NERAD, Komentar Ustave art. 160, n. 59; TESTEN, Komentar Ustave art. 160, n. 27.

thorities and by other organs vested with public powers. Therewith, the legislator explicitly excluded laws and other acts of legislation from the scope of acts that can be contested by this means.

Besides, it is generally recognized that only acts of an authoritative nature can be contested by constitutional complaints.[495] Complaints can thus be filed against decisions of judicial organs or against individual acts or actions of administrative authorities which have a direct legal effect on the applicants' rights and legal position.

bb) Scope of protection

Constitutional complaints can be filed against individual acts which violate human rights and liberties. With the intention to clearly delimit its function from the judiciary, the Constitutional Court already adopted a narrow interpretation from the beginning.[496] It only accepts for consideration complaints filed against violations of rights and liberties guaranteed by the Constitution. Unlike its Croatian counterpart, the Slovene Court from the outset acknowledged only those constitutional guarantees as protected which directly regulate the legal positions of individuals. It considers violations of general guarantees such as the right to equality only in relation to other constitutional rights and liberties.[497] The Constitutional Court moreover acknowledges a wide margin of discretion of the legislator in regulating other fundamental constitutional guarantees. It for instance recognizes social rights only to the extent guaranteed by law and therefore accepts constitutional complaints only if violations of these rights are alleged in connection with violations of other constitutional rights.[498]

cc) Personal requirements for access

Besides the capacity to act, the entitlement to file constitutional complaints is restricted to applicants with a legal interest in the review and invalidation of the contested state act. The Court accordingly requires a personal interest and

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495 See ruling U-I-271/2013 and Up-907/2013 of 19 December 2013, n. 3, not published.

496 For an overview see NERAD, Komentar Ustave art. 160, n. 65.

497 See for many decision Up-2597/2007 of 4 October 2007, n. 3, Uradni list 94/07; OdlUS XVI, 108; ruling Up-13/1992 of 15 February 1995, n. 6 f., not published.

498 KRESAL, Komentar Ustave art. 2, n. 11.

that the complainant is directly affected in his or her legal position by a contested state act.[499] This excludes submittals in a general interest and in the name of other persons without a special authorization to act on their behalf. Furthermore, the Constitutional Court requires that the legal interest is current and that violations still exist at the time of the submittal of a complaint.[500] Finally, applicants need to demonstrate that their legal position can be improved by the invalidation of the contested act.[501]

The legal interest as requirement for individual access to the Constitutional Court of Slovenia will be analysed thoroughly further below in relation to the initiative which can be filed against laws and other acts of legislation.[502]

dd) Formal requirements for access

As indicated by art. 51 para. 1 CCA also the Slovene constitutional complaint was reintroduced as a subsidiary legal remedy for the protection of constitutional rights and liberties. Only applicants who did not achieve protection of their rights before the judiciary are entitled to access the Constitutional Court as last domestic instance. If alleged violations are manifestly obvious and if the exhaustion of remedies entails the risk of irreparable consequence for applicants, the Court can exceptionally accept them for consideration before.[503]

In permanent practice the Constitutional Court assesses the exhaustion of legal remedies from a formal and from a substantial aspect. In a formal aspect all available legal remedies for the protection of human rights and all procedural means allowing effective protection must be exhausted. The Court for instance rejected complaints of applicants who failed to use their right to plea for court orders to temporarily suspend the application of contested individual acts, or their right as opposing party to object to the admissibility of an appeal.[504] With respect to the substantial or material aspect of exhaustion the Court requires that all allegations about violations of constitutional rights are raised already

499 See for many ruling Up-765/2005 of 31 January 2007, n. 2, OdlUS XVI, 59.

500 E.g. decision Up-970/2006 of 11 September 2007, n. 8, Uradni list 87/07 and OdlUS XVI, 103; decision Up-527/2001 of 13 October 2004, n. 12, Uradni list 117/04 and OdlUS XIII, 87.

501 See e.g. ruling Up-1840/2007 of 15 January 2009, n. 4, not published.

502 See below at Chapter 3, pp. 142 ff.

503 For more details see e.g. Mavčič, Zakon o Ustavnem sodišču, 326 ff.

504 Ruling Up-364/2009 of 19 May 2009, n. 4, not published; ruling Up-61/1994 of 1 December 1994, explanation in para. B, OdlUS III, 129.

before the responsible courts.[505] It justifies its rigid approach with the constitutional responsibility of courts to protect rights and liberties and the constitutional and legal order.[506] In several instances its restrictive interpretation resulted in condemnations of Slovenia by the ECtHR for violating the rights to an effective remedy and to trial within reasonable time.[507] The ECtHR for instance sentenced Slovenia for the insufficiency of the complaint as legal remedy against the precarious conditions of detention in Ljubljana prison.[508]

In contrast to the relatively short time limit provided in Croatia, constitutional complaints in Slovenia can be filed within 60 days from the day of passing the contested final individual act. In well-founded cases the Constitutional Court may exceptionally accept late submissions as well.[509] The submittal of constitutional complaints does not involve any financial burden. Their admissibility is therefore not contingent on the payment of court fees or on a mandatory legal representation. Although the proceedings before the Constitutional Court are free of charge, it can impose all procedural costs on one party, who is considered to have caused them by its conduct.[510] With the comprehensive reform in 2007 the legislator introduced the possibility to fine participants for filing abusive, frivolous or vexatious complaints or for their failure to exercise their access rights with due diligence.[511] The Court can also fine attorneys at law whose submittals do not comply with the formal requirements.

Art. 53 CCA lists the requirements regarding the form and content of constitutional complaints. Complaints must accordingly be submitted in writing and present the documents relevant for the decision. They must fully identify the complainant and clearly indicate the contested individual act, the authority responsible for its issuing, the rights and liberties deemed violated, the reasons of the alleged violations and evidence for compliance with the time limit. By publishing templates in Slovenian language on its homepage, the Constitu-

505 E.g. ruling U-I-54/2006 of 27 May 2009, n. 4, Uradni list 47/09 and OdlUS XVIII, 25.

506 E.g. ruling U-I-304/2011 of 10 January 2013, n. 3, not published; decision Up-33/2005 of 6 March 2008, n. 12, Uradni list 40/08 and OdlUS XVII, 25.

507 See judgments *Lukenda vs. Slovenia*, 23032/02, 2005-X, § 65 and *Belinger vs. Slovenia*, 42320/98, 2 October 2001 (friendly settlement), n. 2.

508 Judgment *Mandić and Jović vs. Slovenia*, 5774/10 and 5985/10, 20 October 2011, §§ 118 f.

509 Art. 52 para. 3 CCA Slovenia.

510 Art. 34 para. 2 CCA Slovenia. E.g. decision U-I-61/2011 of 6 July 2011, n. 8, Uradni list 60/11 and decision U-I-220/2010 of 6 July 2011, n. 8, Uradni list 60/11.

511 Art. 34a CCA Slovenia. Mavčič, Slovenian constitutional review, 103 f.

tional Court considerably facilitated the submittal of constitutional complaints.[512] The alleged violations of the rights and liberties must be substantiated by relevant argumentation and evidence. Just as its Croatian counterpart also the Slovene Constitutional Court endeavours to delimit its jurisdiction from the judiciary. Consequently, it emphasizes in permanent practice that it is not competent to assess issues which are of no constitutional relevance and which do not concern violations of the constitutionally guaranteed rights and liberties.[513]

ee) Qualitative requirements for access

In contrast to its Croatian counterpart, the Slovene Constitutional Court is entitled to reject constitutional complaints which are of a minor significance for the protection of constitutional rights and liberties.[514]

Constitutional complaints are not admissible if the alleged violations do not have serious consequences for the complainants and do not severely violate their rights and liberties. On the basis of the explicit enumeration in the law, the Constitutional Court therefore rejects complaints which are substantiated with mere monetary interests of low value and mere small-claims disputes,[515] complaints against decisions on court fees,[516] in trespass to property disputes and against decisions issued in misdemeanour proceedings.[517]

In the absence of a legal concretization of the seriousness of violations, the pertinent case-law reveals that the Constitutional Court requires a certain intensity of the alleged violations. It for instance recognized the exclusion of complainants from accessing courts of appeal as intensive interference with the right to judicial protection while it rejected a complaint against the dismissal of a revision request by the Supreme Court.[518] As intensive interference with the right to family life of an imprisoned complainant, the Court moreover

512 <Http://www.us-rs.si/vloge/vsebina-in-obrazci/> (last accessed September 2018).

513 E.g. decision Up-49/2005 of 23 March 2006, n. 4, Uradni list 35/06 and OdlUS XV, 4; ruling Up-16/1994 of 11 October 1995, n. 7, OdlUS IV, 178.

514 Art. 55a and 55b para. 2 CCA Slovenia. For more details see NERAD, Komentar Ustave art. 160, nn. 76 f.

515 E.g. ruling Up-3055/2007 of 6 June 2008, n. 4, Uradni list 56/08.

516 E.g. ruling Up-996/2009 and U-I-207/2009 of 7 October 2009, n. 3, Uradni list 86/09.

517 E.g. ruling Up-792/2007 of 9 April 2009, nn. 4 f., OdlUS XVIII 72.

518 See for many decision U-I-277/2009 and Up-1333/2009 et al. of 14 June 2011, n. 13, Uradni list 58/11.

recognized an order that introduced particular requirements for visits by his family.[519]

At the same time, the legislator entitled the Constitutional Court to *exceptionally* take into consideration complaints against less serious violations, if they raise questions of a particular value and significance for the constitutional order. In interpreting this provision the Court considers as such decisions with a «precedent nature from the viewpoint of human rights protection standards».[520] A precedent value is recognized if a decision contributes to the previous jurisdiction and to the development of the constitutional law.[521] So far, the Court acknowledged this criterion as fulfilled with respect to decisions in the field of criminal and misdemeanour proceedings.[522] However, the amount of rejections for not relating to questions of a constitutional significance indicates a rigid interpretation of the Court in this respect.[523]

C. Individual access to the Macedonian Constitutional Court

a) Means of indirect individual access

aa) Objection of unconstitutionality

Also Macedonian courts are obliged to refer to the Constitutional Court if they have to apply laws which they consider to be unconstitutional. Neither the Constitution nor the Rules of Procedure prescribe the committal nature of objections raised against the constitutionality of applicable laws by participants to court proceedings. Opponents of a committal nature refer to the parallel existence of the unrestricted access right of individuals on the basis of art. 12 RoP.[524] Supporters, on the other hand, derive a respective obligation of the

519 Decision Up-1618/2008 of 2 April 2009, n. 3, Uradni list 35/09 and OdlUS XVIII, 70. This decision contains dissenting opinions of several judges, who did not consider such visiting rules as serious violation of the complainant's rights.

520 E.g. ruling Up-792/2007 of 9 April 2009, n. 5, OdlUS XVIII, 72.

521 See dissenting opinion of judge JAN ZOBEC and others in decision Up-1619/2008 of 2 April 2009, n. 4, Uradni list 35/09 and OdlUS XVIII, 70.

522 Decision U-I-219/2012 and Up-834/2012 of 19 December 2012, n. 6, Uradni list 15/13; decision Up-1544/2010 of 21 June 2012, n. 4, Uradni list 53/12.

523 See for many ruling U-I-282/2013 and Up 925/2013 of 12 March 2015, n. 20, not published; ruling Up-792/2007 of 9 April 2009, n 6, OdlUS XVIII, 72.

524 ČOBANOV, 246.

courts from the rule of law as fundamental value of the constitutional order.[525] A reference can also be made to paragraph 1 of art. 18 Law on Courts, which states that

> «[t]he court *shall* submit an initiative for the initiation of review proceedings on the constitutional compliance of a law when its compatibility with the Constitution *is questioned* […].» (*Italics and punctuation added*)

In light of this, Macedonian courts can be considered as intermediary bodies and objections made to the courts as means allowing individuals to indirectly access to the Constitutional Court.

bb) Appeals to the ombudsperson

As has been shown, the ombudsperson of Macedonia is empowered to request the initiation of judicial review proceedings. If the request to the Constitutional Court has been provoked by an appeal of an individual person seeking for protection of his or her constitutional rights, the ombudsperson can be considered to act as intermediary body of the individual concerned. At the same time there is no possibility of indirect individual access provided against individual state acts deemed to violate the rights and liberties of individual persons. Like its Croatian counterpart, the Macedonian ombudsperson cannot submit constitutional complaints on behalf of another person. The entitlement to file constitutional complaints is consequently restricted to individuals whose rights are directly affected by contested individual acts or decisions.

b) Means of direct individual access

aa) Right to request the resolution of jurisdictional disputes

By use of its regulatory autonomy the Macedonian Constitutional Court introduced a broad accessibility to proceedings on jurisdictional disputes. It also entitled individuals to request the resolution of conflicts of jurisdiction between different state powers. According to art. 62 para. 1 RoP

> «[a] motion may be submitted by anyone who due to the acceptance or refusal of the competence of separate organs cannot realise his or her right».

The entitlement applies to a wide range of disputes. It applies to conflicts between state organs on a horizontal level and between different levels of state

525 KLIMOVSKI/DESKOSKA/KARAKAMIŠEVA, 199.

administration[526] and conflicts where two or more authorities claim the same power or reject their responsibility to take an action or adopt an act.[527] On the other hand, only applicants with a legal interest in the resolution of a conflict are entitled to apply to the Court. The Constitutional Court accordingly requires that a petitioner is personally affected by a jurisdictional dispute which prevents him or her from exercising his or her rights.[528]

bb) Petition to review acts and actions of political parties

Art. 110 indent 7 Constitution empowers the Constitutional Court to review programs and statutes of political parties and associations of citizens. Its case-law reveals that the Constitutional Court assesses the compatibility of political programs and statutes with the constitution in the same manner as laws and other general acts.[529]

In analogy to art. 12 RoP individuals are entitled to file initiative for the initiation of respective proceedings without having to demonstrate a legal interest. Just as in Slovenia individuals are accordingly granted an additional means to directly access the Macedonian Constitutional Court.[530]

As a consequence of this unrestricted access programs and statutes of ethnic minority parties such as the Albanian party are frequently contested based on allegations that they aim at overthrowing the constitutional order and incite ethnic and religious hatred.[531] Individuals also frequently contest statutes of citizens' associations such as the Statute of the Red Cross[532] and other associations.[533] With reference to the constitutionally guaranteed freedom of association the Macedonian Constitutional Court adopts a restrictive practice in accepting petitions to review political statutes and programs. Yet, with a controversial decision, the Constitutional Court abrogated the program of the citizen

526 Ruling U.br.137/2005 of 7 December 2005, n. 4; ruling U.br.98/1999 of 22 September 1999, n. 2.

527 E.g. decision U.br.125/2009 of 16 December 2009, n. 5; decision U.br.143/2008 of 15 October 2008, n. 5.

528 See e.g. decision U.br.125/2009 of 16 December 2009, n. 5, above at fn. 527 and ruling U.br.252/1992 of 16 December 1992, n. 3.

529 ČOBANOV, 260 accordingly speaks of «constitutional review in the broad sense».

530 See also ČOBANOV, 263 f.

531 E.g. rulings U.br.75/2004 of 21 December 2005; U.br.16/2004 of 19 May 2004 and ruling U.br.215/1997 of 8 April 1998.

532 Ruling U.br.128/2012 of 26 September 2009; ruling U.br.46/2003 of 30 June 2004.

533 E.g. ruling U.br.131/2009 of 4 November 2009; ruling U.br.38/2004 of 14 July 2004.

association «Radko», which aimed at strengthening Bulgarian identity, considering it as incitement to destruction of the Macedonian constitutional order and as propaganda for national and religious hatred and intolerance.[534] The association was dissolved as a result of this decision. Called upon to decide in this matter, the ECtHR sentenced Macedonia for violating the Convention because of the failure of the Constitutional Court to sufficiently justify this decision.[535]

c) Direct access by means of constitutional complaint

In 1991 also Macedonia reintroduced the constitutional complaint as means of direct individual access to the Constitutional Court. In art. 50 para. 1 the Constitution guarantees a general accessibility of the Constitutional Court for the protection of the constitutional rights and liberties. Accordingly art. 51 RoP states that

> «[a]ny citizen considering that an individual act or action has infringed his or her right or freedom […] may lodge an application for protection by the Constitutional Court […].» (*Punctuation added*)

Neither in Macedonian practice nor doctrine did the author succeed in finding an answer to the question whether or not the constitutional complaint is guaranteed as constitutional right.

aa) Objects of complaint

The Constitutional Court determined that constitutional complaints can be submitted against individual acts and actions. It considers as such acts and activities of administrative organs or bodies vested with public powers and decisions of courts at any instance.[536] The Court accepts a direct effect if these acts determine the rights and obligations of specific or determinable individuals in a legally binding and final manner.[537] Therewith, it explicitly excluded laws and other acts of a general nature.

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534 Ruling U.br.168/2000 of 17 January 2001, n. 6.

535 Judgment *Association of citizens Radko and Paunkovski vs. FYROM*, 74651/01, 15 January 2009, §§ 68–78.

536 See Constitutional Court of the Republic of Macedonia, 15 and ruling U.br.93/1996 of 19 June 1996, n. 4.

537 E.g. ruling U.br.83/2013 of 11 September 2013, n. 4; ruling U.br.203/2011 of 21 March 2012, n. 5; ruling U.br.168/1997 of 17 September 1997, n. 4.

bb) Limited scope of protection

The limited protective scope is a special characteristic of the Macedonian constitutional complaint.[538] In art. 110 indent 3 the Constitution determines that the Constitutional Court protects the freedoms and rights related to the freedom of conviction, conscience, thought and public expression of thought, political association and activity and the prohibition of discrimination on grounds of sex, race, religion or national, social or political affiliation. The constitution-makers therewith not only explicitly ruled out the protection of the fundamental constitutional principles and of rights and liberties guaranteed by law. The Macedonian Constitutional Court is even precluded from protecting fundamental rights to human dignity, to life, to physical and mental integrity, to liberty and from all other rights and liberties enumerated in the rights catalogue in Chapter II of the Constitution. In fact, the Constitutional Court rejects its competence to protect rights such as the presumption of innocence, the right to fair trial or the right to work by referring to the exclusive jurisdiction of the judiciary.[539] Such rejections are frequent in the Court's practice.[540]

Several attempts at explaining the reasons of this limited protective scope can be found. Some authors invoke the will of the constitution-makers to restrict the role of the Constitutional Court to the protection of the objective legal order and to allow constitutional complaints only for the protection of such guarantees which are inalienable for the central position of citizens in the state and for popular sovereignty.[541] According to the predominant opinion in doctrine however, the restricted protection offered by constitutional adjudication is incompatible with the function of constitutional rights.[542] Although the Con-

538 For a detailed analysis see KLIMOVSKI/DESKOSKA/KARAKAMIŠEVA, 511; MUKOSKA-ČINGO, 251 f.

539 See for many ruling U.br.109/2013 of 13 November 2013, n. 4; ruling U.br.84/2015 of 23 December 2015, n. 4; ruling U.br.26/2015 of 9 December 2015, n. 4.

540 E.g. ruling U.br.161/2015 of 18 March 2015, n. 6; ruling U.br.79/2013 of 10 December 2014, n. 4; ruling U.br.90/2014 of 25 November 2014, n. 4.

541 See MUKOSKA-ČINGO, 253 f.

542 E.g. KARAKAMIŠEVA, 14; TRENESKA-DESKOSKA, Constitutional Court, 29.

stitutional Court itself criticized that it cannot guarantee a more efficient protection[543] critics also concern the Court itself for not using its regulatory autonomy to extend the protective scope of the constitutional complaint.[544] Finally, the limited scope of protection is considered to contravene the international obligations of Macedonia based on ratified international treaties.[545]

In June 2014 the Government took up these demands and submitted a proposal to extend the scope of protection. Together with seven other proposed draft-amendments the extension of the scope of protection of the constitutional complaint has been confirmed by the National Assembly on 23 January 2015.[546]

cc) Personal requirements for access

While the Rules of Procedure entitle «any citizen» to submit constitutional complaints, they do not contain any concretization of the entitlement. The restricted entitlement to citizens constitutes another particularity of the Macedonian complaint. The Court adopts a broad interpretation and accepts complaints filed by individuals of other nationalities as well.[547] However, it limits the circle of authorized applicants to natural persons and excludes legal persons and other legal subjects.[548] In consistent practice the Court rejects complaints submitted by legal persons, irrespectively thereof whether they claim the violation of one of the liberties protected by constitutional complaints.[549]

Furthermore, the entitlement to file constitutional complaints is predicated on a legal interest and restricted to applicants who are directly addressed and personally affected by contested individual acts. Consequently, the Constitutional Court rejects as inadmissible complaints filed for the benefit and the protection of rights of a third person or the general public and accepts complaints

543 See e.g. the explanations of its competences on <http://ustavensud.mk/?page_id=5224&lang=en> (last accessed September 2018).

544 Discussion with Professor RENATA TRENESKA-DESKOSKA at the Law Faculty of the University of Skopje on 4 April 2014. See also TRAJKOVSKA-HRISTOVSKA, Procedure for Protection of Human Rights, 9 ff.

545 MUKOSKA-ČINGO, 254 f.

546 The proposals adopted by the National Assembly are published in Macedonian on the website of the Assembly <www.sobranie.mk> (last accessed September 2018).

547 MUKOSKA-ČINGO, 252; SKARIĆ, 350 f.

548 Constitutional Court of the Republic of Macedonia, 23 f.

549 E.g. ruling U.br.25/2015 of 8 April 2015, n. 3; ruling U.br.2/2015 of 18 February 2015, n. 3; ruling U.br.138/2013 of 26 February 2014, n. 6.

filed by legal representatives only if they are submitted together with an explicit authorization of persons concerned.[550] Access is further restricted to complainants who demonstrate a current legal interest. The Court accordingly rejects complaints against possible or against already remedied interferences.[551]

dd) Formal requirements for access

The protection offered by the Macedonian Constitutional Court is subsidiary.[552] The Court accordingly rejects complaints which are not filed against final court decisions.[553] In contrast to its counterparts in Croatia and Slovenia, the Macedonian Constitutional Court adopts a less restrictive interpretation of its subsidiarity. It does not require the exhaustion of all available ordinary and extraordinary legal remedies. Rather it considers as sufficient the exhaustion of appeal procedures and of available ordinary remedies of appeal.[554] The relevant case-law however neither reveals whether the exhaustion applies to a substantial aspect as well nor whether the Constitutional Court exceptionally accepts complaints for consideration already before.[555]

The entitlement to submit constitutional complaints is moreover restricted in time. The respective time limit is prescribed by art. 51 RoP and consists of a «relative and subjective» term of two months after the notification about a final individual act and an «absolute and objective term» of five years, which starts to run on the day on which applicants become aware of negative effects of an individual act. Because of the rigid application of the subjective deadline the Court frequently rejects complaints for not being submitted in time.[556]

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550 E.g. ruling U.br.65/2013 of 6 November 2013, n. 4; ruling U.br.89/2013 of 25 September 2013, n. 4.

551 See e.g. ruling U.br.55/2002 of 19 March 2003, n. 4. See also ČOBANOV, 310.

552 SKARIĆ, 697; TRENESKA-DESKOSKA, Constitutional Court, 25.

553 E.g. ruling U.br.75/2015 of 7 October 2015, n. 4; ruling U.br.1/2015 of 27 May 2015, n. 4; ruling U.br.193/2012 of 19 December 2012, nn. 4 f.

554 See National Report of the Macedonian Constitutional Court submitted on the occasion of the XII[nd] Conference of the European Constitutional Courts, 9, retrievable over <http://www.confcoconsteu.org/reports/rep-xii/Macedonia-EN.pdf> (last accessed September 2018). See also SPIROVSKI, 8.

555 See to that effect also ČOBANOV, 312 f.

556 Eg. ruling U.br.110/2014 of 11 February 2015, n. 5; ruling U.br.163/1998 of 7 October 1998, n. 4.

As to the absence of court fees or a mandatory legal representation, the submittal of constitutional complaints does not involve any financial burden for applicants. Complainants bear their own expenses. In contrast to Croatia and Slovenia, there is no provision empowering the Constitutional Court to sanction abusive submittals with penalty fees.

By analogy to the requirements for the submittal of initiatives against laws, constitutional complaints must be filed in written form and in two copies.[557] Complaints can be submitted in Macedonian and Cyrillic script and since the constitutional reform in 2001 also in Albanian language.[558] With respect to the content of complaints, the Rules of Procedure require the full identification of the complainant, the clear indication of the contested individual act, the rights deemed violated and evidence substantiating the allegations and enabling the Court to decide. In contrast to its counterparts in Croatia and Slovenia, the Macedonian Court did not publish a template for constitutional complaints on its website, but allows the correction of incomplete submittals within a predetermined term of maximum 30 days.

The requirement of substantiation probably constitutes the highest hurdle to overcome. The analysis of the pertinent case-law indicates that the Constitutional Court sets high demands as to the substantiation of alleged violations. It requires that applicants demonstrate that alleged violations occurred by the adoption of a contested individual act or in the conduct of the proceedings in which it was passed.[559] In practice the Court moreover rejects a vast number of insufficiently substantiated allegations of discrimination by emphasizing that it is no instance of appeal.[560]

557 Art. 68 in combination with art. 15 para. 1 RoP Macedonia.

558 See art. 7 para. 2 Cst. Maceodnia.

559 See for many ruling U.br.65/2015 of 18 November 2015, n. 5; ruling U.br.88/2012 of 10 October 2012, n. 4. For more details see ČOBANOV, 313 f.

560 E.g. ruling U.br.108/2013 of 18 February 2015, n. 4; ruling U.br.89/2013 of 9 July 2014, n. 4; ruling U.br.99/2013 of 5 February 2014, n. 4.

IV. Conclusion

After their transition Croatia, Slovenia and Macedonia retained their Constitutional Courts established under socialist rule and strengthened them institutionally to a considerable extent. The new Constitutions not only guaranteed their absolute functional, personal and institutional independence, but moreover vested these Courts with more competences. The introduction of the power to eliminate unconstitutional laws can be considered as most noticeable reform in this respect.

The second part of the Chapter shows the broad accessibility of the Constitutional Courts. A wide circle of state organs, public institutions and organizations of social interest is authorized to request the initiation of review proceedings against legislative acts. Given their power to initiate these proceedings at their own discretion, these Courts have been vested with a very strong constitutional position and role. Based on these institutional premises, they are provided with the possibility to adopt a bold approach in enforcing the constitutional orders against the legislative and the political powers.

Furthermore, the three Constitutional Courts are characterized by their openness to the wider public. It is shown that several legal remedies and procedural instruments allow individuals to indirectly and directly access to these Courts. With such a mixed system of access individuals are not only offered alternative ways to achieve protection by the supreme guardians of the Constitutions. They can also combine the advantages of these access means. By inducing the ombudspersons or the regular courts to refer to the Constitutional Courts, they achieve a higher quality and increase the chances of success of their appeals. At the same time they are entitled to directly access the Courts.

Legal remedies which can be filed directly to the Constitutional Courts are of a much higher practical importance. The above shows that individuals in Croatia, Slovenia and Macedonia have at their disposal alternative means of direct access. The parallel existence of constitutional and of popular complaints distinguishes these states from most other systems of concentrated constitutional adjudication. Besides, individuals are entitled to directly access the Constitutional Courts in cases of jurisdictional conflicts and, with the exception of Croatia, by contesting statutes and programs of political parties. This offers a comprehensive protection of the constitutionally guaranteed rights and liberties against the state authorities. It can be seen as expression of the effort to provide strong systems of rights protection and as way to ensure the enforcement of the constitutional order against arbitrary state actions and violations

in a general interest. In a comparative perspective the broad accessibility of these Courts remains the exception and a particular feature of the three successor states considered.

This Chapter described the systems of constitutional adjudication in general and the accessibility of the Constitutional Courts of Croatia, Slovenia and Macedonia in particular. In the following Chapter, the popular complaints will be thoroughly analysed in a procedural aspect and with respect to the position of petitioners in proceedings of judicial review.

Chapter 3: Popular complaints in Croatia, Slovenia and Macedonia

I. Croatian right to propose the initiation of review proceedings

1. Introductory remarks

In Croatia the filing of popular complaint constitutes one of three possible ways to initiate abstract review proceedings, besides requests of authorized applicants and besides initiations by the Court on its own initiative. This access right was reintroduced in 1991. Pusuant to art. 38 para. 1 CCL

> «[e]verybody has the right to propose the institution of proceedings to review the constitutionality of the law and the legality and constitutionality of other regulations.»

Literally translated from the Croatian term *prijedlog*, this access right entitles to «propose» or «suggest» the initiation of review proceedings against laws or other general acts. In contrast to requests filed by authorized applicants, this indicates a non-committal nature which neither results in the initiation of review proceedings nor obliges the Court to do so. Yet, the legal nature of the Croatian proposal is controversial. According to one opinion, the proposal cannot be considered as committal legal remedy and therefore neither as *actio popularis*.[561] Art. 44 CCL determines that requests are «initial acts» and open proceedings on the day of their submittal, while review proceedings upon filed proposals are initiated only on the day the Constitutional Court accepts them for consideration by formal ruling. Therefore, the Croatian proposal is seen as information about the existence of potentially unconstitutional provisions.[562]

According to the prevailing domestic view and in international perception, the proposal is referred to as *actio popularis*.[563] Although subject to a preliminary

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561 LJUBIĆ, Ustavnopravna priroda prijedloga, 7 f.

562 LJUBIĆ, Ustavnopravna priroda prijedloga, 8; LJUBIĆ, Karakter prijedloga, 797, 801.

563 E.g. OMEJEC, O potrebnim promjenama, 55 f.; KRAPAC, Pretpostavke za pokretanje i vođenje, 172; CRNIĆ, Komentar Ustavnog zakona, 77. See also HARUTYUNYAN/NUSSBERGER/PACZOLAY, n. 74; Venice Commission Document CDL-AD(2008)030, n. 51.

assessment, both decisions and rulings of the Constitutional Court must state reasons and the legal foundations.[564] This formalization and the obligation to justify rejections or dismissals oblige the Court to take into consideration every complaint and proposal.[565] This view is confirmed by the Court's practice which shows an equivalent approach in assessing proposals and requests. Without first passing a ruling, the Court as a rule assesses both the procedural requirements and the substantial justification in the same proceedings.[566] Furthermore, it accepts both requests and proposals for consideration if it deems that the allegations raise doubt about the constitutionality or legality of a contested act.[567]

Consequently, the Croatian proposal proves to be more than a mere non-committal suggestion of individuals. It can be considered as a legal remedy which obliges the Constitutional Court to assess its admissibility. Thus, the Croatian proposal is henceforth referred to as popular complaint.

2. Admissibility requirements

Pursuant to art. 41 ff. CCL the admissibility of a proposal is ascertained in a preliminary stage by an appointed judge-rapporteur. By ruling, the Court either rejects proposals for not meeting the requirements for admissibility or, otherwise, accepts them for consideration and opens the requested review proceedings. If a request of an authorized applicant with identical allegations of unconstitutionality is submitted at the same time, the Court skips this preliminary stage and directly assesses a proposal on the merits.[568]

Even though the pertinent procedural rules do not indicate any substantial assessment of proposals at this preliminary stage, the Constitutional Court in practice only opens review proceedings if petitioners succeed in raising doubts

564 Art. 27 para. 3, 28 paras. 1 and 4 and art. 46 para. 2 CCL Croatia.

565 SMERDEL/SOKOL, 188; SMERDEL, Ustavno uređenje Europske Hrvatske, 436.

566 See e.g. ARLOVIĆ, 34.

567 This is also acknowledged by LJUBIĆ, Ustavnopravna priroda prijedloga, 7; IBID., Karakter prijedloga, 797 f.

568 E.g. decision U-II-1414/2003 of 28 September 2004, n. 4, NN 141/04 (English translation available); decision U-I-3824/2003 et al. of 28 April 2004, n. 4, NN 55/04 (English translation available).

about the constitutionality of contested provisions. Consequently, also the failure to substantiate allegations constitutes a failure to comply with the procedural requirements and a reason for rejection of proposals.

A. Jurisdiction of the Constitutional Court

At first, the Constitutional Court assesses whether it is competent to review the contested legislative acts in accordance with the proposals or requests received. Art. 129 para. 1 indents 1–3 Constitution determine which acts of legislation can be reviewed with respect to their constitutionality and legality. In its twenty-five years long practice, the Constitutional Court developed a generous approach and acknowledges its competence to review a comprehensive scope of legislative acts. Also only single provisions of laws or regulations can be reviewed with respect to their constitutionality or legality.[569] If the Constitutional Court does not consider itself competent, it either rejects a proposal or request as inadmissible or for its lack of competence.

a) Benchmarks for judicial review

The Constitution constitutes the primary benchmark for judicial review. Predominantly, allegations raised concern the non-compliance of laws or other acts of legislation with the constitutionally prescribed proceedings for legislation, with basic constitutional principles and, especially, with constitutionally guaranteed rights and liberties or local and regional self-government.

The Croatian constitutional order comprises constitutional laws. These have a basis in the Constitution, regulate specific questions of constitutional importance and are adopted in procedures provided for constitutional amendments. While so far this applies only to the CCL, pending attempts at reform suggest the extension of the constitutional force to other laws. One can also find several other laws titled as constitutional laws, without having been enacted in proceedings for constitution-making. Despite their denomination, these acts do not fulfil the requirements and therefore cannot serve as benchmarks for formal laws. In this context the Constitutional Court speaks of a *falsa nominatio*.[570] Because of the not negligible number of such laws and the

569 Art. 55 para. 1 CCL Croatia.

570 See for many decision U-I-1029/2007 et al. of 7 April 2010, n. 9, NN 47/10. For more details with respect to the *falsa nominatio* practice see e.g. Bačić, Komentar Ustava, 228; Crnić, Komentar Ustavnog zakona, 86.

amount of submittals requesting the Constitutional Court to review the compatibility of laws with these acts, the Court notified the National Assembly about the unconstitutional practice in this regard.[571] For now, the Constitution and the CCL constitute the only constitutional benchmarks for the review of legislative acts.

Laws constitute benchmarks for the review of sub-legislative acts such as governmental or executive acts or regulations. The legal order in Croatia comprises *formal laws* which constitute acts of a general and abstract nature enacted by the National Assembly as legislative authority and in proceedings prescribed for legislation.[572] While ordinary laws are passed by a simple majority of representatives,[573] «organic laws» are adopted by the absolute majority of votes because they regulate specific issues of constitutional relevance, comprising rights and liberties, the electoral system, the powers of governmental bodies and local and regional self-administration.[574] In reviewing acts of legislation the Constitutional Court does not differentiate between ordinary and organic laws. It considers both as subordinated to the Constitution and as benchmarks for sub-legislative acts and rejects its competence to review the compliance between ordinary and organic laws.[575]

Based on art. 141 Constitution, as to which ratified international treaties constitute part of the domestic legal order with legal force above the laws, the Constitutional Court moreover acknowledges its power to review laws and other acts of legislation with respect to their compatibility with international law.[576] Vice versa it rejects to review the compatibility of domestic laws with not ratified international treaties. It accordingly refused to review the compatibility of a law with the Charter of Fundamental Rights of the European Union, before Croatia's accession to the EU on 1 July 2013.[577] With the accession to the EU the laws and the *acquis communautaire* of the EU became legally binding and applicable and constitute benchmarks for the Croatian Constitutional

571 Notification U-X-838/2012 of 15 February 2012, n. 12, NN 20/11 (English translation available).

572 Bačić, Komentar Ustava, 227.

573 Art. 82 para. 1 Cst. Croatia.

574 Art. 83 Cst. Croatia.

575 See e.g. ruling U-I-2720/2007 of 19 November 2008, n. 7, NN 138/08 (English translation available).

576 Decision U-I-745/1999 of 8 November 2000, n. 7, NN 112/00 (English translation available).

577 Ruling U-I-5600/2012 of 23 April 2013, n. 9, NN 58/13.

Court in constitutional review proceedings.[578] As to the knowledge of the author, there is finally no practice of the Court with respect to the applicability of general principles of international law as benchmarks for legislative acts. In this regard different views can be found in Croatian legal theory. Their applicability is justified with a teleological interpretation of the Constitution. As to another opinion it is considered as indispensable to introduce an explicit reference by constitutional revision.[579]

b) Objects of judicial review

aa) Constitutional law

In consistent practice the Constitutional Court declines to review the Constitution or individual constitutional provisions by invoking the supreme binding nature and the exclusive competence of the constitution-makers.[580] After initial refusal, the Constitutional Court acknowledges its competence to review the formal compatibility of constitutional laws with the Constitution. Accordingly it assesses the compliance of the adoption of provisions with the constitutionally prescribed rules for constitutional reform,[581] while rejecting numerous proposals to review the substantial compliance of the CCL with the Constitution.[582]

Its newer practice however indicates that it does not anymore categorically exclude its power to review the compatibility of constitutional amendments with the fundamental constitutional principles.[583] The Court hence acknowledged its competence to review the content of a referendum question on the introduction of the constitutional definition of marriage as community between a man and a woman.[584]

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578 Art 152 in combination with art. 145 Cst. Croatia.

579 Compare BAČIĆ, Ustavno pravo, 520 with OMEJEC, O potrebnim promjenama, 137.

580 See e.g. decision U-I-729/2001 of 6 June 2001, n. 12, NN 55/01. CRNIĆ, Komentar Ustavnog zakona, 85.

581 Ruling U-I-1631/2000 of 28 March 2001, n. 3, NN 27/01.

582 E.g. ruling U-I-453/2015 of 17 February 2015, not published; ruling U-I-699/2000 of 14 June 2000, n. 3, not published, with references to the older practice.

583 Ruling U-I-1523/2011 of 12 August 2014, n. 5, NN 101/14; ruling U-VIIR-164/2014 of 13 January 2014, n. 10, NN 15/14.

584 Communication SuS-1/2013 of 14 November 2013, n. 5, NN 138/13. For a detailed analysis of the constitutional significance of this communication see GARDAŠEVIĆ, 85 ff.

bb) International treaties

Despite their direct legal effect and classification as supra-legislative acts, the Constitutional Court rejects its competence to review ratified international treaties with respect to their content.[585] It justifies this position with the exclusive power of political forces to ascertain the compatibility of treaties with the Constitution and to determine their ratification. As domestic acts the Constitutional Court, on the other hand, accepts to review laws adopted for the ratification of international treaties. In order to not amount to an indirect substantial assessment of the content of international treaties, it reviews laws of ratification only with respect to the compliance of their adoption with the constitutionally prescribed proceedings for ratification.[586]

cc) Formal laws

Formal laws constitute the primary subject-matter of constitutional review. In accordance to the definition above, formal laws comprise all acts of a general and abstract legal nature enacted by the National Assembly in proceedings prescribed for legislation. Adopting a broad interpretation, the Constitutional Court also considers other general acts of the National Assembly as formal laws such as so-called authoritative or authentic interpretations.[587]

Under certain conditions the Constitutional Court moreover considers as laws general acts enacted by the executive organs based on delegated legislative authority. This applies to emergency laws enacted by the Croatian President on the basis of art. 101 Constitution.[588] Also governmental decrees adopted on the basis of a legislative delegation are acknowledged as acts of law which can only be reviewed with regard to their constitutionality.[589]

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585 See e.g. ruling U-I-6454/2015 of 15 December 2015, n. 4, not published; ruling U-I-825/2001 of 14 January 2004, n. 4, NN 16/04 (English translation available).

586 E.g. rulings U-I-6738/2010 and U-I-5705/2010 of 11 June 2013, n. 4, not published; ruling U-I-64462/2009 of 7 July 2010, nn. 4 ff., NN 91/10.

587 E.g. ruling U-I-2488/2004 of 14 November 2007, n. 5, NN 133/07; decision U-II-1362/2005 of 12 October 2005, NN 125/05 (English translation available).

588 See e.g. ruling U-I-179/1991 of 24 June 1992, NN 49/92. For more details in this regard see BAČIĆ PETAR, 413 f.; PEŠUT, 31 ff.

589 BAČIĆ, Komentar Ustava, 191; CRNIĆ, Komentar Ustavnog zakona, 92. ARLOVIĆ, 27 f. however qualifies these decrees as «other regulations».

dd) Other regulations

The Croatian Constitutional Court moreover reviews other regulations with respect to their compatibility with the Constitution and the laws. After its comprehensive jurisdiction under socialist rule, the Constitutional Court defined regulations as sub-legislative general normative acts adopted by authorized governmental bodies.[590] This broad understanding of general acts for instance comprises decisions of legislative bodies to call a referendum[591] or sub-legislative acts and regulations enacted by the government and other organs of the executive power.[592]

In practice the Constitutional Court is faced with numerous requests and proposals filed against executive acts with a mere internal legal effect for an administrative unit[593] or which are not of a generally binding nature.[594] While they were frequently reviewed during socialist rule, contractual or collective agreements with administrative bodies do not fulfill the new requirements for judicial review anymore today.[595]

Until 2012 the Constitutional Court also reviewed general acts adopted by bodies or organizations authorized to carry out public services, and general acts of bodies of legal and regional self-administration.[596] With the enactment of the new Administrative Disputes Act in 2012 the review of these acts was explicitly reserved to the jurisdiction of the administrative judiciary.[597] As a result, the Constitutional Court halted all pending review proceeding against

590 Decision U-II-37/2006 et al. of 5 July 2011, n. 15, NN 89/11; ruling U-II-2994/2002 of 22 February 2006, n. 3, NN 31/06.

591 Decision U-II-1917/2004 of 9 February 2005, n. 4, NN 26/05 (English translation available). See also decision U-II-3205/2004 of 2 February 2005, n. 6, NN 22/05.

592 E.g. decision U-II-2927/2013 of 13 November 2014, NN 139/14; decision U-II-1118/2013 et al. of 22 May 2013, n. 5, NN 63/13 (English translation available). For more references to the case law see KRAPAC, Postupak pred Ustavnim sudom, n. 46.2.

593 See for many ruling U-II-2125/2006 of 18 September 2012, n. 5, not published; ruling U-II-2333/2001 of 25 February 2004, n. 4, NN 27/04 (English translation available).

594 See for instance ruling U-II-414/2015 of 17 February 2015, n. 5, not published; ruling U-II-4846/2004 of 22 December 2004, n. 2, NN 5/05.

595 E.g. ruling U-II-363/2015 of 17 February 2015, n. 3, not published; ruling U-II-6962/2014 of 2 December 2014, n. 3, not published.

596 See for many ruling U-II-3449/2009 of 29 June 2010, n. 6, NN 86/10; decision U-II-2821/2006 of 10 February 2009, n. 3, NN 28/09 (English translation available).

597 Art. 3 para. 2 Administrative Disputes Act, NN 20/10, 143/12. See hereto ARLOVIĆ, Ocjena ustavnosti i zakonitosti drugih propisa, 19 ff., 25.

these acts and conferred them to the High Administrative Court.[598] With the exception of statutes of communities, counties and cities, which are significant for local self-governance,[599] the Court ever since rejects its competence to review such administrative disputes.[600]

ee) Legislative acts without legal validity

In 2002 the Constitutional Court's review competence was extended to laws and other acts of legislation which ceased to be effective at the time of the proceeding.[601] Ever since, proposals and requests can also be filed against laws and regulations that are not in force anymore. This extension is the result of the acknowledgement that unconstitutional provisions can have negative impacts even after they ceased to be effective. The Constitutional Court accordingly passes declaratory judgments, which allow the submittal of claims of reconsideration or reparation in order to remedy persisting negative consequences.[602]

The entitlement of individuals to propose the initiation of review proceedings against acts which are no longer effective is restricted. Such submittals must be filed within one year after the contested act lost its legal validity.[603] Furthermore, the Court requires the existence of reasons justifying an assessment of invalid normative acts. It for instance rejected a proposal because a declaration of the unconstitutionality of the invalid provision would neither improve the legal position of the petitioner nor serve a general public interest.[604]

On the other hand, the Constitutional Court refuses to review drafts of laws or regulations or to conduct preventive review.[605] An attempt to introduce its competence to review the compatibility of international treaties with the Constitution before their ratification has been made on the occasion of the elaboration of the draft for constitutional amendments in November 2013 but was not considered anymore in the proposal. However, the Court derives from its

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598 Ruling U-II-5157/2005 et al. of 5 March 2012, NN 41/12 (English translation available).

599 Ruling U-II-5157/2005, n. 3, above at fn. 598.

600 In place of many see ruling U-II-3236/2015 of 20 October 2015, n. 3, not published; ruling U-II-4547/2013 of 4 November 2014, n. 5, not published.

601 Art. 129 para. 1 indent 3 Cst. Croatia and art. 56 CCL Croatia.

602 CRNIĆ, Komentar Ustavnog zakona, 145; OMEJEC, O potrebnim promjenama, 62 f.

603 E.g. ruling U-I-2392/2012 of 17 February 2015, n. 5, not published; ruling U-II-526/2008 of 10 September 2013, n. 3, not published.

604 Ruling U-I-2581/2014 of 15 October 2014, n. 6, not published.

605 See already ruling U-I-215/1992 of 26 October 1992, NN 82/92.

power to assess invalid provisions its entitlement to review provisions which have been published in the Official Gazette but, due to the eight-day waiting period after publication, have not come into force yet.[606] In turn, it refuses to review unpublished legal provisions for not becoming effective, unless the failure to publish them violates the principle of publicity.[607]

ff) Lack of review competence

The Constitutional Court is faced with a vast number of proposals and requests to review legislative acts and to assess questions for which it has no competence.

Frequently, it refuses to review laws with respect to legal gaps and legislative omissions, considering the absence of regulations as a political decision and not necessarily as issue of constitutionality.[608] If, however, it deems that the absence or insufficiency of a regulation is constitutionally relevant or «a threat to the very existence of a fundamental right guaranteed in the Constitution», it acknowledges its competence to review.[609]

In consistent practice the Constitutional Court also refuses to review the mutual compatibility of normative acts with the same legal force. It frequently rejects proposals to review inconsistencies between formal laws, formal and organic laws or between sub-legislative acts.[610] It accordingly refuses to assess the compatibility of legal provisions with acts of a lower normative value and hierarchical position in the legal order.[611]

Furthermore, one can find numerous rulings by which the Constitutional Court rejects proposals so as to not interfere with the constitutional powers of other state organs. It refuses to review allegations against the manner in which laws

606 Decision U-I-5654/2011 of 15 February 2012, n. 7, NN 20/12 (English translation available).

607 E.g. decision U-II-296/2006 of 27 October 2010, nn. 5 ff., NN 126/10. See also decision U-II-994/2002 of 16 January 2003, n. 8, NN 14/03 (English translation available).

608 See e.g. ruling U-I-1477/2007 et al. of 15 February 2011, n. 10, NN 25/11.

609 E.g. decision U-I-4892/2004 et al. of 12 March 2008, n. 18, NN 37/08 (English translation available); decision U-I-659/1994 of 15 March 2000, n. 19, NN 31/00.

610 See for many ruling U-I-2134/2015 of 2 June 2015, n. 5, not published; ruling U-I-7415/2010 of 4 November 2014, n. 11, NN 136/14; ruling U-I-2168/2007 of 14 June 2011, n. 9, NN 74/11.

611 Ruling U-I-3227/2008 of 1 March 2011, n. 6, NN 35/11.

or regulations are applied onto concrete and individual cases.[612] Accordingly, it rejects proposals which substantiate alleged unconstitutionalities with violations by the application or implementation of laws.[613] Given that such allegations can only be verified by assessing the application of a contested provision onto every individual case, the Court invokes the primary responsibility of the judiciary.[614]

As expression of judicial self-restraint towards the legislative authorities, the Constitutional Court rejects to review laws or regulations with respect to their expediency and justification. In reference to art. 2 para. 4 indent 1 Constitution it concedes a wide scope of discretion to the National Assembly in determining economic, legal and political questions in accordance to the concrete economic, financial and social circumstances and within the framework given by the Constitution. As political decisions the Court therefore rejects to review the expediency and existence of alternative options.[615] Its case-law indicates that it acknowledges of a broad scope of legislative discretion.[616] Furthermore, the Constitutional Court frequently rejects proposals for contesting acts without an independent legal nature, such as consolidated wordings or corrections of laws.[617] By referral to the exclusive competence of legislative authorities, the Court also refuses to review the terminology and legal denominations of legal institutions and acts,[618] terminological inconsistencies between legal acts,[619] or to assess typographical errors.[620] Finally, it refuses to correct,

612 E.g. ruling U-I-6264/2014 of 4 March 2015, n. 8, NN 31/15; ruling U-I-4933/2004 et al. of 2 February 2010, n. 6, NN 25/10.

613 See e.g. ruling U-I-1085/2000 et al. of 30 April 2008, n. 9, NN 59/08; ruling U-I-197/1999 et al. of 23 March 2005, n. 17, NN 47/05 (English translation available).

614 Ruling U-I-949/1995 of 23 November 2005, n. 7, not published.

615 E.g. ruling U-I-3006/2010 of 30 April 2014, n. 7, not published; ruling U-I-2534/2008 et al. of 31 January 2012, n. 11, NN 17/12.

616 With respect to legal relations see e.g. decision U-I-722/2009 of 6 April 2011, n. 19, NN 41/11 (English translation available) and ruling U-I-2767/2007 of 31 March 2009, n. 4, NN 51/09 (English translation available). In relation to economic questions and relations see e.g. decision U-IP-3820/2009 et al. of 17 November 2009, n. 10, NN 143/09 (English translation available) and in relation to social services and help see decision U-I-988/1998 et al. of 17 March 2010, n. 14.6, NN 40/10 (English translation available).

617 E.g. ruling U-I-3185/2005 of 20 October 2009, n. 7, NN 135/09; ruling U-I-2597/2003 of 12 January 2005, nn. 5 f., NN 11/05 (English translation available).

618 E.g. ruling U-I-189/2005 of 24 July 2015, n. 4, not published; decision U-I-1152/2000 et al. of 18 April 2007, n. 25, NN 43/07 (English translation available).

619 Ruling U-I-1108/1998 of 22 December 2004, n. 3, NN 5/05.

620 Ruling U-II-1369/2005 of 28 June 2006, n. 4, not published.

change or supplement legal provisions in order to remedy alleged violations of the Constitution and the laws, or to interpret unclear legislative provisions.[621]

While reserving to itself the right to notify the National Assembly about the necessity to eliminate established shortcomings in legislation,[622] the Constitutional Court does not refrain from abrogating provisions if the listed deficiencies amount to violations of fundamental constitutional principles. As a consequence of such constitutionally relevant deficiencies, political issues become constitutional. Such regulations can amount to discriminations[623] or restrict constitutionally guaranteed rights in an unproportional manner.[624] The Court for instance considered the terminology of a provision in a curriculum as inappropriate because it referred only to the «possibility» instead of the «right» to lessons held in minority languages.[625]

B. No requirement of a legitimate interest

After transition the Croatian constitution-makers retained the unrestricted access to judicial review proceedings as provided under socialist rule. The entitlement to submit proposals against laws or other regulations is therefore not limited to persons with a legal interest in bringing judicial proceedings. Applicants do not have to demonstrate that the contested law or regulation interferes with their personal rights or legal positions. It is argued that the teleological interpretation of art. 38 para. 1 CCL impedes the assumption of a legal interest as access requirement.[626]

The unrestricted entitlement to propose the initiation of review proceedings against laws and other regulations allows unlimited access to the Croatian Constitutional Court. Proof of this is the broad range of applicants who file proposals in practice. The predominant number of proposals received is sub-

621 For instance ruling U-I-2358/2011 of 5 March 2013, n. 3, NN 32/13; ruling U-I-694/2000 of 23 January 2002, n. 5, not published.

622 E.g. ruling U-I-1625/2014 et al. of 18 July 2014, n. 10, NN 100/14; decision U-I-120/2011 of 29 July 2011, n. 30, NN 93/11.

623 E.g. decision U-I-4170/2004 of 29 September 2010, nn. 15 ff., NN 123/10; ruling U-I-402/2003 et al. of 30 April 2008, n. 9, NN 70/08 (English translations available).

624 E.g. ruling U-I-3789/2003 of 8 December 2010, n. 7.3, NN 142/10.

625 Decision U-II-993/1997 et al. of 8 November 1999, NN 129/99.

626 KRAPAC, Pretpostavke za pokretanje i vođenje, 201.

mitted by private individuals with Croatian citizenship and of other nationalities.[627] A large number is filed by legal persons of private law including private businesses, economic enterprises or insurances.[628] Besides political parties[629] and trade unions[630] the numerous civil organizations belong to the most active petitioners against laws and other regulations.[631] The Constitutional Court also receives several proposals submitted by public law institutions, such as universities and faculties,[632] and by other government units as cities and even other states.[633]

As a «collecting pool», the Constitutional Court finally treats all submittals as popular complaints which do not fulfil the procedural requirements for filing requests. Illustrative is the example of a request filed by an individual judge of the Commercial Court.[634] Although rather improbable in practice, it is even possible that supreme political authorities file proposals instead of requests against acts of legislation.[635]

C. Requirements of form and substance

a) Form and content of proposals

Art. 17–19 and art. 39 f. CCL contain requirements as to the form and substance of proposals.

627 E.g. ruling U-I-6738/2010 et al. of 11 June 2013, see above fn. 586; ruling U-II-1273/2000 of 13 April 2010, NN 59/10.

628 E.g. ruling U-II-526/2013 of 10 September 2013, not published; decision U-I-2470/2010 of 9 July 2013, NN 99/13.

629 E.g. ruling U-I-4365/2008 of 26 March 2013, NN 43/13; ruling U-I-3597/2010 et al. of 29 July 2011, NN 93/11 (English translation available).

630 E.g. decision U-I-2036/2012 of 21 December 2015, NN 138/15; decision U-I-283/1997 of 12 May 1998, NN 69/98 (English translation available).

631 From the recent case-law see ruling U-I-437/2013 et al. of 4 November 2014, NN 139/14; ruling U-I-1350/ 2011 of 4 November 2014, not published; ruling U-I-897/2014 of 4 March 2014, NN 32/14.

632 E.g. ruling U-I-133/2002 et al. of 21 March 2007, not published; decision U-I-1190/1999 et al. of 22 March 2000, not published.

633 E.g. ruling U-I-8069/2014 of 23 January 2015, NN 14/15; ruling U-I-2921/2003 et al. of 19 November 2008, NN 137/08 (English translation available).

634 See e.g. decision U-I-4175/2013 of 27 October 2013, NN 108/13. See also decision U-I-4633/2010 of 6 March 2012, NN 35/12 (English translation available).

635 CRNIĆ, Vladavina Ustava, 48.

Applications must be filed in written form and submitted to the Constitutional Court directly or by mail. Orally communicated proposals, proposals submitted by electronic mail or by written messages sent by facsimile, are not considered as validly filed.[636] Proposals can be submitted in Croatian and Latin script or in another language or script acknowledged as official in local units. Applicants must supplement their complaints by a copy of the law or regulation whose constitutionality or legality is disputed and by means of evidence essential for the decision of the Constitutional Court. Unlike the requirement of full identification for the submittal of constitutional complaints and the possibility under socialist rule to submit initiatives anonymously, proposals must merely contain a signature or the seal of the petitioner.

Requests and proposals submitted must be complete, clear and understandable. Applicants must precisely designate the disputed legal provision and name the exact constitutional or legal norm claimed to be violated. Furthermore, they must substantiate and justify alleged inconsistencies with convincing arguments. Its case-law reveals that the Constitutional Court adopts a rigid practice in acknowledging substantiations as sufficient basis for the acceptance of proposals for consideration. Petitioners must provide concrete reasons which substantiate the inconsistency of a contested norm with the Constitution or laws. The allegations must seem credible to the Court and provide a sufficient basis for its decision. In practice petitioners show difficulties in adequately substantiating abstract normative incompatibilities and justifying that alleged violations of the Constitution or the laws directly arise from the contested legal provision.[637]

b) Improvement of insufficient and unclear proposals

In consistent and rather stringent practice, the Constitutional Court rejects proposals for not complying with the formal requirements or for being unclear or incomplete. To prevent excessive formalism, the Court returns inadequate submittals to the petitioners and determines a term for the resubmission of corrected or supplemented proposals.[638] It informs the petitioners about the consequences if the return conditions are not complied with.[639] The failure to return proposals within the ordered term is considered as withdrawal, while

636 Art. 92 para. 1 RoP Croatia.

637 See for many ruling U-I-4097/2004 et al. of 10 November 2004, n. 4, NN 167/04; ruling U-I-1582/2004 of 27 October 2004, nn. 3 and 6, not published.

638 Art. 19 paras. 2–4 CCL Croatia.

639 See Crnić, Pokretanje postupka, 3.

their resubmittal without correction results in their rejection for being inadmissible.[640] Insufficiently substantiated proposals are, on the other hand, dismissed as «manifestly unfounded» without any possibility of improvement.

D. Temporal restrictions

Proposals to initiate review proceedings against legally valid laws and regulations can be submitted at any time. On the other hand, the principle of legal certainty requires a temporal limitation of the right to file requests or proposals against legal provisions which ceased to be effective. Invalid provisions can merely be contested within one year after losing legal force.[641] Failures to comply with this term result in the rejection of submittals.[642]

E. Cost burden

As already stated, the submittal of complaints to the Constitutional Court does not involve any financial burden for applicants, neither by court fees nor by an obligation to be legally represented. A proposal to introduce court fees in 2002 was rejected by the National Assembly.[643] Travel costs, stamp duties, fees for optional legal representation and other expenses related to the proceedings before the Constitutional Court are borne by the petitioners themselves based on art. 23 CCL. In contrast to the sanction to reimburse intentionally caused expenses by the unsuccessful submittal of constitutional complaints, no financial deterrence is provided for abusive requests or proposals to initiate review proceedings.

640 E.g. ruling U-I-7551/2014 of 21 January 2015, n. 8, not published.

641 Art. 129 para. 1 indent 3 Cst. Croatia and art. 56 para. 1 CCL Croatia.

642 See e.g. ruling U-II-5111/2012 et al. of 9 April 2014, n. 5, not published; ruling U-I-2418/2001 of 11 July 2007, n. 10, NN 90/07.

643 The introduction of court fees was discussed on the occasion of the reform of the CCL 2002 in order to improve the national budget. The draft provision was however deleted by the National Assembly in order to not restrict the access to wealthy applicants only, see statements made in the session of the Assembly published in Report (IHS) no. 305 of 27 July 2001, 33 f., 38 and 40.

F. Procedural obstacles

a) Principle of res iudicata

In accordance with art. 31 para. 1 CCL, decisions of the Constitutional Court conclude constitutional litigations by final and generally binding judgments. According to the principle of *res iudicata*, these decisions cannot be reassessed and overturned by any domestic judgment – not even by the Constitutional Court itself. Consequently, normative provisions of which the constitutionality or legality has been established by legally binding decisions cannot be contested by a new request or proposal anymore.

Yet, with the introduction of art. 54 CCL in 1999 the Court was empowered to review acts of legislation, which have already been reviewed with respect to their constitutionality or legality.[644]

While the Venice Commission criticized this reform for being problematic in view of the principles of res iudicata and legal certainty,[645] the rigid interpretation of this competence by the Constitutional Court mitigates the Commission's concerns. In principle, the Court still refuses to review the constitutionality or legality of already reviewed legal provision with reference to the res iudicata principle. It only accepts its power to reassess an already reviewed legal provision on the basis of well justified grounds.[646] Petitioners must accordingly provide new reasons which constitute a suitable basis for a change of decisions. Another justified ground is given if the Constitutional Court establishes an essential change of the factual and legal situation.[647] Furthermore, these justified grounds must be suitable to raise doubts about the constitutionality or legality of a contested provision and make a change of the Court's previous decision probable.[648] The burden to substantiate a probable change

644 For a detailed analysis see KRAPAC, Postupak pred Ustavnim sudom, n. 36.1.

645 Venice Commission Document CDL-INF(2001)2, n. 19.

646 For details to the practice see e.g. CRNIĆ, Komentar Ustavnog zakona, 133 ff.; OMEJEC, Granice ovlasti, 1438 f.

647 E.g. ruling U-I-4187/2013 of 2 December 2014, n. 11, not published; ruling U-I-1401/2009 et al. of 9 April 2014, n. 6, not published.

648 See e.g. decision U-I-1569/2004 et al. of 20 December 2006, n. 4, NN 2/07 (English translation available); decision U-I-241/2000 of 10 May 2000, nn. 4 ff., NN 50/00 (English translation available).

of opinion lies with the petitioners. Failures to do so result in the dismissal of proposals for being unfounded.[649]

b) Withdrawal or lapse of procedural requirements

Art. 61 CCL prescribes that

> «[t]he Constitutional Court may end the proceedings, if the applicant withdraws the request or the proposal, and shall do so in the cases when the requirements for the conduct of proceedings cease to exist.»

On the one hand, this provision allows the Constitutional Court to terminate review proceedings in the event of the withdrawal of a proposal or to continue them at its own discretion.[650] On the other hand, it obliges the Court to terminate proceedings if contested provisions are amended or cease to exist after the submittal of a proposal to initiate review proceedings. The invalidity of contested acts of legislation during the preliminary proceedings implies a lapse of the procedural requirements and an impediment to the admissibility of proposals. This applies to explicit eliminations of contested provisions[651] and to cases where legal provisions cease to be effective implicitly, for instance, because of the elimination of their constitutional or legal basis and the lack of relevant transitory provisions,[652] or because of their timely limited validity.[653] If however petitioners specifically request the continuation of the proceedings based on their previous proposals, the Court continues the preliminary proceedings even after the elimination of a contested provision based on art. 56 CCL.[654]

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649 In place of many see ruling U-I-6660/2014 of 25 November 2014, n. 3 f., not published; ruling U-I-7018/2010 et al. of 15 February 2011, nn. 3 ff., NN 28/11.

650 E.g. ruling U-I-5081/2013 of 9 April 2014, n. 4, not published; ruling U-I-4028/2004 of 18 October 2006, n. 5, not published.

651 E.g. ruling U-I-677/2011 of 27 January 2015, not published; ruling U-I-851/2001 of 13 October 2004, nn. 5 f., NN 147/04.

652 E.g. ruling U-I-1441/2001 of 23 October 2003, n. 4, NN 177/03 (English translation available).

653 E.g. ruling U-II-3659/2003 of 28 April 2004, nn. 3 f., not published.

654 For instance ruling U-II-1299/2005 of 3 October 2006, n. 4, NN 114/06. See in this respect also LJUBIĆ, Ustavnopravna priroda prijedloga, fn. 7.

G. Examination of the merits

The analysis of the pertinent case-law reveals that, contrary to the procedural regulations, the Constitutional Court normally ascertains the substantiation of allegations at the same procedural stage as the procedural requirements and decides on the merits of the complaint without first closing the preliminary proceedings by ruling.[655] If it considers the substantiations as founded, the Court concludes the proceedings and invalidades the contested legal provisions by final decision.[656] If, on the other hand, it finds that contested provisions are not in breach of the Constitution or the laws or that the allegations do not raise doubts regarding their constitutionality or legality, it rejects proposals by rulings rather than by formal decisions as prescribed by art. 27 para. 2 CCL.[657] Therewith, rulings are conceded the same final and legally binding effects as formal decisions, despite their procedural nature.

The case-law reveals that the Constitutional Court schedules separate proceedings in cases where it finds proposals to raise complex or important constitutional questions of a general significance. It acts accordingly if it considers that its decisions require a detailed analysis and consultation of expert opinions, statistical data or the jurisdiction of the ECtHR, the ECJ and of courts of other states. The Court for instance assessed in two-stage proceedings proposals filed against provisions on temporary salary cuts for public servants,[658] on the control and legislative intervention regarding the use of property rights,[659] and on a provision alleged to violate the self-governing competence of communities and regions with respect to planning and development of health facilities.[660]

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655 See also ARLOVIĆ, 34; CRNIĆ, Komentar Ustavnog zakona, 115; IBID., Vladavina Ustava, 48.

656 For illustration see decision U-I-4469/2008 et al. of 8 July 2013, nn. 30 f., NN 90/13 (English translation available); decision U-I-4445/2008 et al. of 4 October 2011, NN 123/11 (English translation available).

657 See for many ruling U-I-3558/2006 et al. of 6 July 2011, n. 12, NN 85/11 (English translation available); ruling U-I-4398/2008 et al. of 8 December 2008, n. 15, NN 142/10 (English translation available).

658 Ruling U-I-1625/2014 et al. of 18 July 2014, n. 14, see above at fn. 622 and decision U-I-1625/2014 of 30 March 2015, NN 40/15; ruling U-I-4405/2013 et al. of 18 July 2014, n. 22, NN 101/14 and decision U-I-4405/2013 of 31 March 2013, NN 41/15.

659 Ruling U-I-897/2014 of 4 March 2014, n. 5, see above at fn. 631.

660 Ruling U-I-4633/2010 of 28 October 2010, n. 5, NN 123/10 and decision U-I-4633/2010 of 6 March 2012, see above at fn. 634.

3. Status of petitioners in review proceedings

As has been shown, abstract review proceedings are primarily established as objective proceedings which serve for the assessment and the enforcement of the Constitution and the legal order against the legislative authorities. Nevertheless, the Croatian constitution-makers combined the review proceedings with a number of procedural elements which improve the procedural status of petitioners in judicial review proceedings.

A. Obligation to complete proceedings

Initially, the Constitutional Court was obliged to terminate proceedings if the procedural requirements were no longer met.[661] Under this regime, amendments of reviewed provisions were a frequent cause for the termination of review proceedings.[662] Since the enactment of the new CCL in 2002, cessations of the requirements during main proceedings do not have any impact on their completion anymore. Once the main review proceedings have been instituted, art. 57 para. 1 CCL obliges the Court to complete the assessment on the merits of the case and to issue a decision on the constitutionality or legality of a challenged provision.

For petitioners who seek protection of their rights, the obligation of the Constitutional Court to adopt a final judgment on their allegations can be of great importance.[663] To consider are cases where a legal provision, which is contested for being inconsistent with the Constitution, is amended or ceases to be valid during the review proceedings. Only on the basis of the declaratory decision of the Court on the incompatibility of the contested provision with the Constitution, can the petitioners claim the reconsideration of individual acts which have been adopted in application of such a provision and therewith achieve protection.[664]

B. Temporal limitation of proceedings

The procedural regulations contain a particular temporal restriction addressed to the Constitutional Court itself. Art. 40 para. 2 CCL prescribes that the Court

661 Art. 27 para. 1 CCL Croatia, NN 13/91.
662 Crnić, Postupak pred Ustavnim sudom, 3.
663 See Venice Commission Document CDL-INF(2001)002, n. 21.
664 See below pp. 130 f.

must institute proceedings within one year upon receipt of a proposal. Furthermore, art. 33 CCL prescribes a one year term for the adoption of decisions upon accepted proposals. These temporal limitations ensure a swift opening and rapid conduct of the review proceedings and the treatment of proposals within a reasonable time.

However, these terms are criticized by the Venice Commission and in constitutional doctrine for being unrealistic and inexpedient, particularly with respect to the complexity of abstract review proceedings.[665] The fact that the Court in practice normally transgresses these terms shows that these critiques prove to be true and that the deadlines are nothing more than instructions.

C. Participatory rights in review proceedings

a) Applicability of Convention standards for fair proceedings

As a principle proceedings before the Croatian Constitutional Court are based on the inquisitorial model and non-adversarial. Facts of cases are accordingly established by the Constitutional Court alone and the assessment and decision-making is conducted in closed sessions.[666] Petitioners and applicants are, on the other hand, not vested with procedural rights and guarantees as are enjoyed by parties to proceedings.

With respect to Croatia, the ECtHR confirmed the applicability of the Convention standards for fair proceedings for constitutional complaint proceedings at several instances.[667] In judgment *Juričić vs. Croatia* it for instance established a violation of the adversarial principle by the Constitutional Court for notifying the complainant about several requested expert opinions only after the proceedings had ended.[668]

As has been shown, the ECtHR considers these standards to be applicable to judicial review proceedings only if a victim status of the applicants is given. Applicants must either be directly affected in their rights by a legislative act

665 Venice Commission Document CDL(2000)97, n. 4 ; CRNIĆ, Komentar Ustavnog zakona, 77 ff.

666 See ARLOVIĆ, 11 f.; KRAPAC, Postupak pred Ustavnim sudom, n. 21.1.

667 See for instance judgments *Peruško vs. Croatia*, §§ 44–53; *Čamovski vs. Croatia*, §§ 38–44; *Slaviček vs. Croatia*, 20862/02, 2002-VII, §§ 51–58.

668 Judgment *Juričić vs. Croatia,* §§ 72–78.

or the review proceedings must be in close procedural relation with civil or criminal proceedings to which the applicant is participant.[669]

b) Participatory rights of petitioners in review proceedings

Components and rights considered to be structural elements of fair trials can be found in the procedural regulations on the review proceedings before the Croatian Constitutional Court. Irrespectively of their non-adversarial nature, the constitution-makers introduced procedural guarantees which ensure the right of petitioners to *information* and which allow their *participation* in ongoing proceedings at the discretion of the Court.

Accordingly, every petitioner has a right to be informed about the acceptance or rejection of a proposal and about the course of the proceedings and to receive and consult all documents relevant for their outcome.[670] Besides the disclosure of the filings, written opinions of scientific legal advisors other written observations of state bodies, this also encompasses the right to transcript and to copy the respective documentation. The right of information finally guarantees petitioners to receive decisions or rulings, in which the Court explains the reasons and demonstrates the legal foundations upon which its decisions are based.

Although a claim right to personal presence and participation in the review sessions of the Constitutional Court is not guaranteed, petitioners can be optionally invited to the proceedings. Because these are held as adversary proceedings, petitioners are allowed to participate and exert influence on the decision-making.[671] The Court can invite them to consultative sessions together with the legislative authorities concerned, legal scientists and experts. Art. 49 para. 1 CCL entitles the Court to do so if it considers such discussions necessary for passing a decision on the merits of the case. Petitioners can moreover be convoked at public hearings scheduled by the Court based on art. 50 para. 3 CCL. As shown above, the ECtHR confirmed that the particular nature of proceedings before constitutional courts justifies the exclusion of the public if the latter has been included sufficiently before lower judicial instances who established the facts of the cases.[672] Yet, the absence of regulations prescribing the mandatory scheduling of public hearings in cases with

669 For the relevant case-law of the ECtHR see above Chapter 1, pp. 37 f.
670 Art. 43 para. 2 CCL Croatia and art. 93 para. 1 RoP Croatia.
671 See KRAPAC, Postupak pred Ustavnim sudom, n. 21.1.
672 E.g. *Juričić vs. Croatia*, §§ 89 ff.

severe impacts on human rights has been criticized by the Venice Commission for being inconsistent with the ECHR standards.[673]

D. Power to extend the scope of assessment

In contrast to the Constitutional Court's restricted discretion in examining violations by individual acts, no such constraint to the scope of substantiations is prescribed for the review of laws or other regulations. Here, the Court can extend its review and exceed the scope of allegations of proposals or requests.[674] Of particular importance is its power to review laws or regulations even upon insufficient or unfounded substantiations, if it recognizes their incompatibility with the Constitution and laws based on other grounds. In individual cases the Constitutional Court therefore reviewed contested provisions with respect to completely different or broader reasons than alleged by proposal.[675]

Principally, this extension of the review scope is a consequence of the objective protective purpose of abstract review proceedings which are based on the inquisitorial principle. On the other hand, it is also the result of the distinct power of the Croatian Constitutional Court to act at its own discretion. From the perspective of petitioners, the Court therewith enhances the chances of success of their petitions. This power can also be considered to enforce judicial protection of applicants with difficulties to substantiate abstract normative inconsistencies. Yet as a rule, the Constitutional Court restricts its assessment to the allegations made and reviews contested provisions within the framework of the reasons and arguments presented in the submittal.[676]

4. Achievement of individual rights protection

Besides the enhanced procedural status of petitioners, the Croatian constitution-makers additionally combined the judicial review proceedings with procedural means providing them with the possibility to achieve concrete legal benefits and the protection of their individual rights and liberties.

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673 Venice Commission Document CDL-INF(2001)002, n. 18.

674 See also KRAPAC, Postupak pred Ustavnim sudom, nn. 20.3, 35.1.

675 See to this effect ruling U-I-5553/2012 et al. of 4 November 2014, n. 15, NN 139/14; decision U-I-988/1998 et al. of 17 March 2010, n. 4, see above at fn. 616.

676 See OMEJEC, Granice ovlasti, 1438; PINTARIĆ, 406.

A. Suspension of applicability of laws

Already before passing a final decision, the Constitutional Court can temporarily suspend the execution of individual acts which are adopted on the basis of a contested law or act of legislation. By making use of this competence pursuant to art. 45 CCL, it eliminates the disadvantages arising from the non-suspensive effect of submittals. It inhibits the application of potentially unconstitutional laws already during the review proceedings if this is necessary to ensure legal certainty and to prevent the occurrence of grave and irreparable consequences.[677]

Initially the Constitutional Court restricted itself to ordering the suspension of the execution of existing individual acts which were already adopted by the administrative and judicial bodies.[678] This practice was criticized in legal theory and by the Venice Commission, who suggested the extension of this power to the suspension of a law or legal provision, itself.[679] The analysis of its newer practice shows that the Constitutional Court adopted a broader interpretation. It orders the suspension of the execution of all individual acts including those already adopted and such intended to be adopted on the basis of a reviewed legal provision[680] or even of the entire contested law.[681]

The possibility to temporarily suspend the applicability of a reviewed law is timely restricted to the duration of the main proceedings. The order of suspension depends on the admissibility of a proposal.[682] The fact that the Constitutional Court cannot suspend the applicability of legal provisions already upon the receipt of proposals is criticized for hampering the effective protection both of the legal order and of the petitioner's rights.[683] Over and above, as suspension orders can be issued at the longest until the final decisions, they

677 See justification in ruling U-I-3861/2013 of 16 July 2013, n. 7, NN 99/13.

678 E.g. rulings U-II-538/1994 of 7 June 1994 and U-I-756/1996 et al. of 23 January 1997, NN 8/97. For a detailed description of the practice see Crnić, Komentar Ustavnog zakona, 124 ff.

679 Venice Commission Document CDL-INF(2001)002, n. 20.

680 E.g. ruling U-I-3861/2013 of 16 July 2013, n. 7, see above at fn. 677; ruling U-I-1457/2013 of 11 April 2013, n. 5, NN 49/13.

681 With respect to the Family Act see ruling U-I-3101/2014 of 12 January 2015, NN 5/15.

682 E.g. ruling U-I-3117/2003 of 28 June 2006, n. 9, NN 89/06 (English translation available).

683 For more details see Crnić, Komentar Ustavnog zakona, 124 ff.

are only relevant if the Court decides to schedule separate proceedings for the review of contested provisions.[684]

The Constitutional Court orders temporary suspensions either on its own initiative if it considers the requirements to be fulfilled,[685] or upon respective requests of the petitioners. These requests must be submitted together with the proposal to initiate review proceedings. So as to substantiate their request, petitioners must present reasons indicating the occurrence of grave and irreparable consequences by the execution of the act.[686]

The Constitutional Court moreover emphasizes that its orders to temporarily suspend the applicability of reviewed legal provisions do not prejudge its final decision on their compatibility with the Constitution and the laws.[687] Irrespectively of the perspectives of success of proposals, it orders the temporary suspension only if it considers the allegations of negative and irreparable consequences as plausible. Because the CCL does not contain any concretizations regarding the nature and degree of such consequences, the Constitutional Court developed its own practice in this respect.[688] In these decisions there is no evidence that the Constitutional Court takes into consideration and weighs up these consequences with possible detrimental effects of its orders of suspension and other interests concerned.

B. Legal effect of decisions

Another essential factor for the effective protection of the petitioner's rights and liberties are the legal effects of the final decisions on the compliance of reviewed provisions with the Constitution and the laws. The Constitutional Court is accordingly empowered to issue different decisions with different legal impacts.[689] If it establishes a violation of the Constitution or the legal order, it abrogates reviewed laws or regulations with a mere legal effect for the future (*ex nunc*). Decisions to annul unconstitutional or unlawful regulations and

684 E.g. decision U-I-4763/2012 et al. of 18 September 2013, n 4, NN 120/13; ruling U-I-4763/2012 et al. of 3 April 2013, n. 6, NN 43/13.

685 E.g. ruling U-I-3861/2013 of 16 July 2013, n. 7, above fn. 677.

686 See e.g. explanation II of decision U-I-880/1997 et al. of 20 September 2000, NN 95/00.

687 See SMERDEL, Ustavno uređenje Europske Hrvatske, 438.

688 See e.g. ruling U-I-897/2014 of 4 March 2014, n. 6, see above at fn. 631; ruling U-I-3861/2013 of 16 July 2013, n. 7, above fn. 677; ruling U-I-1457/2013 of 11 April 2013, n. 4, above fn. 680.

689 Art. 131 Cst. Croatia and art. 55 CCL Croatia. For a detailed presentation of the relevant case law see KRAPAC, Postupak pred Ustavnim sudom, n. 50.

other sub-legislative acts have a retroactive effect and deprive all final individual acts adopted thereon from their legal basis (*ex tunc*). Furthermore, the Court can issue declaratory decisions so as to do justice to violations that continue to exist even after unconstitutional provisions ceased to be effective.

Decisions to abrogate unconstitutional or unlawful legal provisions become legally valid with their publication in the Official Gazette. The provisions become inapplicable to all pending administrative or judicial proceedings which have not yet been closed by final decision, while individual acts passed in application of it cannot be enforced anymore.[690] The petitioners and all other persons addressed by the respective provisions are protected from violations of their rights which would occur by the application of such provisions.[691]

The decision to abrogate unconstitutional regulations or to annul them with a retroactive effect is at the Constitutional Court's discretion.[692] For petitioners seeking protection, this retroactive effect implies both a protection against future interferences and the availability of a basis for claims against violations already suffered by the application of these provisions. However, the severe impact on legal certainty obliges the Constitutional Court to adopt a restraint approach in annulling unconstitutional regulations. The pertinent case-law accordingly indicates a respective reservation of the Court.[693]

C. Reparation and compensation for violations suffered

The Croatian Constitutional Court underlines that also abrogated legal provisions violated the Constitution before their elimination. Accordingly, any person who suffered negative consequences from the application of unconstitutional provisions must be provided with means for legal protection.[694] Irrespectively thereof whether the Court annuls or abrogates unconstitutional provisions, petitioners are legally entitled to request reparation for violations suffered by the application of such provisions.[695]

690 Art. 55 para. 2 CCL Croatia. See CRNIĆ, Vladavina Ustava, 59.
691 See CRNIĆ, Komentar Ustavnog zakona, 142 f.; OMEJEC, Legal effects, 154.
692 See SMERDEL, Ustavno uređenje Europske Hrvatske, 439. Relativizing, ARLOVIĆ, 39.
693 With respect to the Court's practice before 2001 see OMEJEC, Legal effects, 163 f.
694 See decision U-III-86/2001 of 17 September 2003, n. 6, NN 159/03.
695 Art. 57 para. 2, 58 paras. 1–3 and art. 60 CCL Croatia.

a) Request for reconsideration

Reparation for violations suffered is granted by the right to request the renewal of proceedings in which rights violating individual acts have been adopted on the basis of unconstitutional or unlawful provision. The reconsideration of such acts requires a respective request by the persons concerned. The Court accordingly states that «without such an initiative, there is no possibility to interfere with the existing legal situation».[696] Its final decisions to invalidate unconstitutional provisions and decisions, by which it declares the unconstitutionality of provisions before they ceased to be effective, provide legal bases for the claim to renew the proceedings before the responsible authorities.[697]

In cases where unconstitutional provisions are merely abrogated, only the petitioners who gave the initiative for initiating review proceedings are entitled to request the reconsideration of individual acts adopted on the basis of these provisions. This entitlement can be seen as a reward for successful petitioners given that all other persons upon whom the abrogated provision has been applied but who remained inactive are excluded from the entitlement. This restriction is criticized with respect to an effective protection of constitutional rights and liberties.[698] Only in exceptional cases, namely if contested legal provisions lose legal force already during the review proceedings, or if they constitute the legal basis for final sentences for criminal offences or if abrogated provisions violate human rights and liberties or discriminate individuals or groups, is the entitlement to request the reconsideration of final individual acts extended to all persons, whose rights have been violated by decisions or individual acts adopted on the basis of abrogated provisions.[699]

The entitlement is restricted to persons whose rights and liberties have been violated by the application of unconstitutional provisions. The Court accordingly excludes decisions on the formal unconstitutionality or illegality from constituting basis for claims of reconsideration.[700]

Finally, the right to request the reconsideration of individual acts adopted on the basis of unconstitutional provisions is limited in time. Requests can be

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696 See decision U-III-17/1998 of 6 February 2002, n. 6, NN 34/02.

697 CRNIĆ, Vladavina Ustava, 60 f.; IBID., Komentar Ustavnog zakona, 145 f., 150.

698 CRNIĆ, Komentar Ustavnog zakona, 149; GIUNIO, 3. SMERDEL, Ustavno uređenje Europske Hrvatske, 440 suggests that persons affected should be entitled to submit collective proposals for the initiation of review proceedings.

699 Art. 57 para. 2 and 58 paras. 1 and 3 CCL Croatia. See ARLOVIĆ, 41. Critical, GIUNIO, 3.

700 E.g. decision U-II-37/2006 et al. of 5 July 2011, n. 21, NN 89/11.

filed within six months from the day of publication of the Constitutional Court's decision and irrespectively of the instant the petitioner gains knowledge about the decision.[701]

b) Request for reconsideration for the failure to apply regulations

The right to request the reconsideration of final decisions is also granted for violations resulting from the failure of courts to apply regulations for erroneously considering them to be inconsistent with the Constitution and the laws.[702] This particular entitlement is a consequence of their power to not apply regulations and other sub-legislative acts that they deem to be unconstitutional or illegal based on art. 37 para. 2 CCL and to base their decisions directly on the law.[703]

If the Constitutional Court finds no such unconstitutionality or illegality, the responsible court is considered to have violated the principle of legality and to have failed to protect the rights of the parties to the proceedings. While the proceedings correspond to the requests for reconsideration of individual acts adopted on the basis of unconstitutional laws, the entitlement comprises everybody whose rights have been violated by the refusal of the court to apply a regulation.[704] Furthermore, the time limit to file respective requests amounts to one year after the publication of the Court's decision.

c) Subsidiary request for compensation for damage

If no redress can be achieved anymore by means of reconsideration of individual acts, petitioners can request compensation for damages suffered.[705] Requests for compensation are submitted to a court of justice.[706] Because of its subsidiary function as redress, the requirements regarding the entitlement correspond to those for requests of reconsideration.

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701 CRNIĆ, Komentar Ustavnog zakona, 150 speaks of an «objective term».

702 Art. 60 CCL Croatia.

703 See above at Chapter 2, p. 77.

704 CRNIĆ, Komentar Ustavnog zakona, 154.

705 Art. 59 CCL Croatia.

706 In contrast hereto, the Constitutional Court is responsible to order compensation in relation to constitutional complaints based on art. 62 para. 3 CCL.

II. Slovene petition to initiate review proceedings

1. Introductory remarks

Until the enactment of the CCA the right of everyone with a legal interest to access the Constitutional Court as guaranteed in art. 162 para. 2 Constitution served as basis for the Court for handling submittals filed by individual persons.[707] Its practice was implemented with the adoption of the CCA in 1994 and concretized with the enactment of the new CCA in 2007. As to art. 24 para. 1 CCA

> «[a]nyone who demonstrates legal interest may lodge a petition that the procedure for the review of the constitutionality or legality of regulations or general acts issued for the exercise of public authority be initiated.»

Besides the requests of authorized applicants the submittal of petitions constitutes one of two ways to initiate review proceedings against laws or other acts of legislation before the Slovene Constitutional Court.

The legal term used for the Slovenian popular complaint, *pobuda,* can be literally translated as «initiative» or «petition». The terminology and the pertinent rules on the procedural effects indicate a non-committal nature. Art. 22 para. 1 CCA accordingly prescribes that review proceedings are opened with the ruling of the Constitutional Court to accept such petitions for consideration, while they are initiated directly with the submittal of a request of authorized applicants. In accordance with the Croatian proposal the decision to initiate the review proceedings is left to the discretion of the Court. Yet, also here rulings on the dismissal of petitions must include a statement of reasons just as is required for decisions.[708] The Court is consequently obliged to assess every submittal with respect to the fulfilment of the procedural requirements and to decide whether or not to accept it for consideration.[709] The formalized proceedings, in which such assessments take place, show an equal procedural effect of all submittals in practice. Even though petitioners must comply with more stringent requirements than qualified applicants the Slovene petition is more than a mere non-committal initiative or suggestion.

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707 MAVČIČ, Slovenian constitutional review, 54 f.

708 Art. 26 para. 3 CCA Slovenia and art. 66 para. 1 RoP Slovenia.

709 MAVČIČ, Individual complaint, 19.

On the other hand, there is no uniform opinion as to whether the petition constitutes an *actio popularis*. According to one view, the necessity to demonstrate a legal interest shows the intention of the constitution-makers to not provide for a popular complaint.[710] Yet other scholars describe the petition as *quasi actio popularis* or *quasi popular complaint*, stating that, irrespectively of the requirement of a legal interest, the function of the petition corresponds to the *actio popularis* in its original form and the initiative under socialist rule.[711] This view is shared by the Constitutional Court itself.[712]

2. Admissibility requirements

The initiation of review proceedings requires a ruling of the Constitutional Court by which it confirms the acceptance of petitions for consideration. The assessment of the fulfilment of the procedural conditions is conducted in preliminary proceedings which serve the preparation of this ruling.[713] So as to reduce the flood of applications an additional procedural step has been introduced with art. 21a CCA and art. 37 and 38 RoP. In this «pre-procedure»,[714] the Secretary General of the Court preselects received petitions and eliminates manifestly inadmissible or evidently unsuccessful submittals and such from which «it cannot be expected that an important legal question will be resolved».

Irrespectively of this predefined procedural order, the analysis of its case-law reveals a rather inconsistent practice of the Constitutional Court. The Court justified this fact by explaining that the different requirements could neither be ascertained in a strict order nor isolated from each other.[715] In practice it principally starts with those deficiencies that are more evident than the others. Not least as consequence of this position it assesses both the admissibility and

710 E.g. NERAD, Pravni interes, 72; TESTEN, Komentar Ustave art. 162, n. 20.

711 MAVČIČ, Slovenian constitutional review, 92. This view can be found in foreign literature too, see BRUNNER, Zugang des Einzelnen, 230; HARUTYUNYAN/NUSSBERGER/ PACZOLAY, n. 76.

712 See decision U-I-185/2010 and Up-1409/2010 of 2 February 2012, n. 14, Uradni list 23/12 and OdlUS XIX, 33.

713 TESTEN, Tehnike ustavnosodnega odločanja, 219.

714 This terminology is used by the Court itself; see Annual Report 2011, 39.

715 Ruling U-I-87/1999 of 8 July 1999, n. 10, Uradni list 60/99 and OdlUS VIII, 180 (English translation available).

the validity of the allegations of unconstitutionality or unlawfulness of a contested provision in one and the same proceedings.

A. Jurisdiction of the Constitutional Court

Like the Croatian Court also the Slovene Constitutional Court primarily assesses whether it is competent to review contested acts in accordance with petitions received. Its powers to review acts of legislation are specified in art. 160 para. 1 indents 1 – 5 Constitution. As to art. 21 para. 3 CCA the review competence includes the assessment of the procedures in which laws or other acts of legislation have been adopted. The extensive scope of legislative acts subject to review vests the Constitutional Court with comprehensive powers for the enforcement of the hierarchy of the constitutional and legal order in Slovenia.[716] The case-law and practice developed by the Court with respect to its jurisdiction is very comprehensive.

a) Benchmarks for judicial review

The Constitution constitutes the primary benchmark for the review of acts of legislation. Besides, the constitutional order in Slovenia encompasses all normative acts and provisions of constitutional relevance, comprising constitutional acts on the implementation and on amendments of the Constitution, fundamental Constitutional Charters of importance for the constitutional system and the transition of Slovenia,[717] and such regulating human rights and minority rights. On the other hand, the CCA of the Constitutional Court is enacted by the National Assembly by simple majority and constitutes a formal law and no benchmark for legislative authorities.[718]

Laws are benchmarks for regulations and other general acts of authorities of the state and local communities. In consistent practice the Constitutional Courts defines laws on the basis of formal criteria such as their denomination and their enactment in procedures prescribed for legislation.[719] As only exception the Court considers the Standing Orders of the National Assembly and the National Council[720] as formal law based on purely substantial criteria, because

716 TESTEN, Komentar Ustave art. 160, n. 2.

717 E.g. the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia of 25 June 1991, Uradni list 1/9.

718 Art. 86 in combination with art. 162 para. 1 Cst. Slovenia.

719 TESTEN, Komentar Ustave art. 160, n. 7: NERAD, Komentar Ustave art. 160, n. 8.

720 TESTEN, Komentar Ustave art. 160, n. 8; NERAD, Komentar Ustave art. 160, n. 12.

of their external legal effect regulating legislative procedures and the relation to other state organs.[721] In contrast to Croatia the Slovenian legal order does not know any hierarchy between laws, no matter whether they are enacted by qualified majority.[722] The Court only takes into consideration the higher democratic legitimacy in case of an inconsistency between formal laws.[723]

International treaties constitute benchmarks for laws and other acts of legislation. The normative precedence of international law is guaranteed as fundamental principle in art. 8 Constitution. Based on the monist system international law is self-executing and awarded precedence over all domestic laws.[724] International human rights treaties are even considered to have constitutional rank.[725] The precedence over domestic laws applies to ratified international agreements only, while agreements binding for Slovenia through membership in international or supranational organizations, such as secondary EU law, are no benchmark for laws.[726] On the other hand, Slovenia acknowledges the precedence of general principles of international law over domestic laws and therewith their validity as benchmarks for judicial review.[727]

Finally, regulations serve as benchmarks for the review of general acts enacted by non-governmental bodies.

b) Objects of judicial review

aa) Constitutional law

As a rule, the Constitutional Court refuses to review acts of a constitutional nature. In reference to the lack of competence it rejects requests and petitions

721 See e.g. decision U-I-40/1996 of 3 April 1997, n. 3, Uradni list 24/97 and OdlUS VI, 46 (English translation available).

722 KRIVIC, 61 f.; TESTEN, Komentar Ustave art. 160, n. 6.

723 NERAD, Komentar Ustave art. 160, n. 6; TESTEN, Komentar Ustave art. 160, n. 6.

724 See decision U-I-6/1993 of 1 April 1994, n. 5, Uradni list 23/94 and OdlUS III, 3.

725 See art. 15 para. 1 Cst. Slovenia. In relation to the ECHR see ruling Up-43/1996 of 30 May 2009, n. 12, OdlUS IX, 141.

726 Decision U-I-238/2007 of 2 April 2009, n. 60, Uradni list 32/09 and OdlUS XVIII, 13. For more details see GRASELI, Komentar Ustave art. 8, nn. 2 and 6.

727 See e.g. decision U-I-60/2006 et al. of 7 December 2006, n. 56, Uradni list 1/07 and OdlUS XV, 84 (English translations available); decision U-I-248/1996 of 30 September 1998, n. 17, Uradni list 76/98 and OdlUS VII, 176 (English translation available).

to review the conformity of the Constitution with ratified international treaties.[728] In contrast to its Croatian counterpart the Slovene Court refuses both to review the content of constitutional provisions and to assess their adoption.[729] This restrictive approach is criticized by scholars who acknowledge a supra-constitutional rank of provisions regulating procedures for constitutional amendments.[730] The Constitutional Court itself has not (yet) acknowledged such an inner hierarchy of constitutional provisions.

bb) International treaties

While the Constitutional Court refuses to review ratified international treaties, it derives its competence to review domestic acts of ratification from its power to ensure the constitutionality of the internal legal order.[731] In accordance with its Croatian counterpart the Slovene Court assesses whether these acts of ratification were enacted in accordance with the constitutionally prescribed proceedings.[732] Even though there are indications that it accepts its competence to review the substantial compatibility of ratification acts with the Constitution,[733] the Court has not yet explicitly confirmed this.[734]

It is important to note at this point that the right of individuals to petition does not apply to the power of the Constitutional Court to preliminary review of international treaties. Given the political impact, this entitlement is restricted to the political organs.[735]

cc) Formal laws

Also the Slovene Constitutional Court is predominantly requested to review the constitutionality of laws. As shown, the Court applies formal criteria in establishing whether or not a challenged act is to be considered as law.[736] These requirements are fulfilled by the CCA[737] and by any other act designated

728 Opinion Rm-1/1997 of 5 June 1997, n. 12, see above at fn. 392.
729 See e.g. ruling U-I-7/2015 of 23 September 2015, n. 2, not published.
730 TESTEN, Komentar Ustave art. 160, n. 11; NERAD, Komentar Ustave art. 160, n. 3.
731 For more details see ŠKRK, 89 f.; NERAD, Komentar Ustave art. 160, n. 51.
732 E.g. ruling U-I-128/1998 of 23 September 1998, n. 6, OdlUS VII, 173.
733 See ruling U-I-128/1998 of 23 September 1998, n. 6, OdlUS VII, 173.
734 See NERAD, Pravni interes, 59; ŠKRK, 92.
735 Opinion Rm-1/1997 of 5 June 2007, n. 16, see above at fn. 392. See also NERAD, Komentar Ustave art. 160, n. 49; ŠKRK, 89.
736 Above pp. 135 f.
737 E.g. ruling U-I-60/2011 et al. of 14 February 2013, Uradni list 19/13.

as law and enacted in proceedings prescribed for legislating. In contrast to its Croatian counterpart the Slovene Court refuses to review authoritative interpretations of laws independently from the respective legal norm.[738] It only does so when it considered interpretations as abusive for entailing hidden amendments or supplements and for not having been enacted in the proceedings prescribed for legislation.[739]

The Slovene Constitution does not provide for governmental decrees with the force of law. Only the President of the Republic is entitled to issue regulations with the force of law if the Assembly is not able to convene during states of emergency or war.[740] Such presidential decrees constitute valid objects of constitutional review. Yet, to the knowledge of the author, the Constitutional Court did not have the opportunity yet to decide in this regard.

dd) Regulations and other general acts

The Constitutional Court also reviews regulations and other sub-legislative acts on the state and the community level, which as to art. 153 para. 3 Constitution must be in conformity with the Constitution and the laws. The Court verifies its power to review regulations based on mere substantial features.[741] The provision must be general and abstract and relate to an unspecified circle of addressees. Besides, it must be of a normative nature and have an external legal impact.[742] It is noteworthy that regulations are put on the same level in the domestic normative hierarchy no matter whether they are enacted by state authorities or organs of local self-government and that they can only be reviewed with respect to their compliance with the Constitution, binding international law and the laws.[743]

In its twenty-five years of activity the Court established a comprehensive case-law in this respect. It considers as regulations general acts which are passed

738 E.g. decision U-I-128/2011 of 14 February 2013, n. 8; Uradni list 20/13.

739 Decision U-I-51/2006 of 15 June 2006, n. 12, Uradni list 66/06 and OdlUS XV, 53; decision U-I-201/2002 of 17 December 2003, n. 7, Uradni list 133/03 and OdlUS XII, 99.

740 Art. 92 para. 3 and art. 108 para. 2 Cst. Slovenia.

741 For a detailed analysis see TESTEN, Komentar Ustave art. 160, nn. 14 ff.; NERAD, Komentar Ustave art. 160, nn. 15 ff.

742 See e.g. ruling U-I-245/2013 of 14 November 2013, n. 2, not published; ruling U-I-378/1996 of 16 January 1997, n. 2, OdlUS VI, 5.

743 NERAD, Komentar Ustave art. 160, nn. 20 f.; TESTEN, Komentar Ustave art. 160, n. 18.

by the National Assembly outside of proceedings for legislating.[744] Mainly, however, the Court acknowledges as such governmental and administrative acts adopted by bodies with executive powers.[745] Also resolutions adopted by other state organs such as the Bank of Slovenia or the National Electoral Commission are recognized as regulations if they fulfil the established material conditions.[746]

In practice the Court rejects a considerable number of petitions and requests filed against governmental acts for not meeting the established criteria. This applies to acts that are of a concrete and individual nature,[747] that regulate the internal organization or matters[748] or lack a normative effect.[749]

ee) General acts issued for the exercise of public authority

The review power of the Slovene Constitutional Court also explicitly comprises general acts adopted by non-governmental bodies and persons, who are vested with specific public authorities and the competence to issue general regulations in relation to their public assignment.[750] The addition «for the exercise of public authority» explicitly excludes private law acts.[751]

As to the criteria developed by the Constitutional Court such acts must regulate rights and duties of legal subjects in a general manner and have a normative effect.[752] Additionally, they must have obtained legal force by publication

744 E.g. decision U-I-34/1993 et al. of 19 October 1994, Uradni list 74/94 and OdlUS III, 115 (English translation available).

745 E.g. decision U-I-173/2011 of 23 May 2013, n. 9, Uradni list 49/13. ŠTURM, Komentar Ustave art. 153, nn. 9 ff.; TESTEN, Komentar Ustave art. 160, n. 17.

746 E.g. ruling U-I-109/1992 of 11 November 1993, Uradni list 65/93 and OdlUS II, 100 (English translation available).

747 See for many ruling U-I-217/2014 of 17 December 2014, n. 6, not published; ruling U-I-43/2002 of 21 March 2002, n. 13, Uradni list 28/02, 85/02, OdlUS XI, 165.

748 E.g ruling U-I-213/2014 of 8 January 2015, n. 3, not published; decision U-I-169/2003 of 19 May 2005, n. 12, Uradni list 54/05 and OdlUS XIV, 28.

749 E.g. ruling U-I-280/2005 of 18 January 2007, n. 14, Uradni list 10/07 and OdlUS XVI, 7.

750 Art. 160 para. 1 indent 5 Cst. Slovenia and art. 21 para. 1 indent 5 CCA Slovenia. See e.g. ruling U-I-8/2003 of 13 February 2003, n. 3, not published; decision U-I-251/2000 of 23 May 2002, n. 8, Uradni list 50/02 and OdlUS XI, 86.

751 MAVČIČ, Zakon o Ustavnem sodišču, 159; TESTEN, Komentar Ustave art. 160, n. 19.

752 See e.g. ruling U-I-230/2011 of 26 June 2012, n. 5, not published; ruling U-I-297/2008 of 7 April 2011, Uradni list 30/11 and OdlUS XIX, 20.

in the Official Gazette.[753] Requiring the cumulative fulfilment of these conditions, the Constitutional Court adopts a restrictive practice in accepting its competence to review general acts of non-governmental bodies.[754]

It is worth noting that the power of the Constitutional Court to review general acts of non-governmental bodies or persons also with respect to their compliance with regulations is criticized in legal theory. It is not only considered as an interference with the jurisdiction of the judiciary but also as risk of an even more excessive workload for the Court.[755] Yet, owing to its restrictive approach, the review of such general acts does not have a great practical significance.

ff) Legislative acts without legal force

With the exception of its power to review international treaties before their ratification, the Constitutional Court considers itself competent to review only legally valid legislative provisions. However, the CCA allows the review of invalid acts in exceptional cases.

Based on art. 47 CCA the Court reviews acts of legislation which ceased to be effective. In contrast to Croatia this review competence is not restricted in time. Petitioners must demonstrate a need for legal protection because of the persistence of harmful consequences even after a provision lost its legal validity and their legal interest to achieve legal redress.[756] This requires that the Court's decision can effectively lead to the improvement of the petitioner's legal position.[757] In this respect it is free to determine whether its decision, by which it declares the unconstitutionality of a provision during its legal validity, has a mere future legal effect as abrogation or whether it is annulled with a retrospective effect.[758] As a rule, the Constitutional Court declares a reviewed provision as annulled if it has already been applied by a final decision.[759] This

753 E.g. decision U-I-251/2000 of 23 May 2002, n. 4, see above at fn. 750.
754 NERAD, Komentar Ustave art. 160, n. 22.
755 See KRIVIC, Ustavno sodišče, fn. 5; TESTEN, Komentar Ustave art. 160, n. 21.
756 MAVČIČ, Zakon o Ustavnem sodišču, 266.
757 Decision U-I-296/1996 of 19 March 1998, n. 10, Uradni list 42/98 and OdlUS VII, 53.
758 The legal effects of its decisions are specified in art. 45 paras. 2 and 3 CCA Slovenia.
759 See e.g. decision U-I-239/2004 of 19 October 2006, n. 6, Uradni list 112/06 and OdlUS XV, 74.

provides petitioners with a basis for their request of reconsideration and change of the final decision.[760]

As its Croatian counterpart also the Slovene Constitutional Court refuses to review laws and regulations that have not entered into legal force, for instance, because the referendum deadline did not expire yet.[761] On the other hand, it accepted its competence to review laws and regulations that have been published but have not yet entered into legal force.[762] Only if it considers the failure to publish a general act as misuse of legislative powers or as result of a wrong interpretation does the Constitutional Court review unpublished general acts as well.[763]

gg) Lack of review competence

Also the Slovene Constitutional Court is faced with numerous petitions and requests to review acts or to decide on legal issues outside its jurisdiction.

As a principle it refuses to review legal gaps and legislative omissions by referral to the responsibility of the judiciary to fill them according to the established methods of interpretation. It only reviews omissions based on art. 48 CCA if it considers them as unconstitutional. This is the case if a regulation is necessary in a specific field and the existing loophole cannot be filled by interpretation,[764] or if the failure to regulate impedes the realization and exercise of human rights and liberties.[765]

Besides, the Constitutional Court rejects numerous petitions to review the mutual compatibility of acts of the same hierarchical rank.[766] However, also here the Court acknowledged that such incompatibilities can amount to violations

760 E.g. decision U-I-396/1996 of 7 November 1996, n. 7, Uradni list 66/96 and OdlUS V, 145. See below pp. 167 ff.

761 See ruling U-I-55/2015 of 22 June 2015, n. 3, not published.

762 E.g. ruling U-I-234/1998 of 16 July 1999, OdlUS VII, 154.

763 See for many decision U-I-357/2007 et al. of 15 May 2008, nn. 19 f., Uradni list 73/01 and OdlUS XVII, 19.

764 E.g. decision U-I-50/2011 of 23 June 2011, n. 17, Uradni list 55/11 and OdlUS XIX, 24.

765 See e.g. decision U-I-345/2002 of 14 November 2002, n. 8, Uradni list 105/02 and OdlUS XI, 230 (English translation available).

766 See for many decision U-I-244/2014 of 10 September 2015, n. 10, Uradni list 69/15; decision U-I-245/2001 of 12 February 2004, n. 7, Uradni list 19/04 and OdlUS XIII, 9.

of the rule of law and other constitutional principles.[767] It requires that petitioners explicitly outline the inconsistency and substantiate their allegations with a violation of the rule of law.[768]

The Slovene Constitutional Court rejects to carry out activities that exceed its powers to the extent reserved to the jurisdiction of the other state organs. By invoking the primary jurisdiction of the judiciary it refuses to review the application or implementation of contested laws or regulations and to give consultations with respect to their implementation or interpretation.[769] As sign of judicial self-restraint towards the legislator, the Constitutional Court moreover refuses to assess laws or regulations with respect their expediency or appropriateness. It invokes the indispensability of political discretion for finding appropriate political solutions on the basis and within the framework of the constitutional principles and objectives.[770] In order not to interfere with this political discretion, it rejects petitions for being filed out of mere dissatisfaction with prescribed rules. It acknowledges a broad scope of political discretion with respect to regulations of economic significance,[771] on social relations[772] and to such prescribing procedures for democratic law-making.[773] Only if such provisions undermine the constitutionally guaranteed rights does the Court accept its competence to review.[774] The same finally applies to deficiencies such as technical or editorial corrections, to typographical errors and terminological inconsistencies, which the Court reviews only if it considers them to be constitutionally relevant.[775]

767 E.g. decision U-I-227/2000 14 February 2002, n. 19, Uradni list 100/00, 62/01, 23/02 and OdlUS XI, 23. For more details, see TESTEN, Komentar Ustave art. 160, n. 5.

768 See e.g. decision U-I-281/2009 of 22 November 2011, n. 19, Uradni list 105/11 and OdlUS XIX, 29.

769 E.g. ruling U-I-59/2014 and Up-1122/2012 of 15 October 2015, n. 7, Uradni list 82/15; decision U-I-267/2006 et al. of 15 March 2007, n. 31, Uradni list 29/07 and OdlUS XVI, 20.

770 See decision U-I-36/2000 of 11 December 2003, n. 14, Uradni list 133/03 and OdlUS XII, 98.

771 E.g. ruling U-I-243/2012 of 18 October 2012, nn. 3 ff., not published.

772 E.g. decision U-I-36/2000 of 11 December 2003, nn. 14 f., see above at fn. 770.

773 E.g. ruling U-I-276/2012 and Up-1018/2012 of 7 March 2013, n. 6, not published.

774 See ruling U-I-276/2012 of 7 March 2013, n. 6, see above at fn. 773.

775 Decision U-I-175/2003 of 7 April 2005, nn. 7 f., Uradni list 46/05 and OdlUS XIV, 18.

B. Requirement of a legitimate interest

The Slovene right to petition for the initiation of review proceedings differs considerably from the initiative provided during socialist rule and from the proposals in Croatia and Macedonia. In contrast to these forms of unrestricted access the accessibility of the Slovene Constitutional Court to individuals is considerably more limited.

a) Preliminary remarks

Already from the beginning of its activity in 1991 the Constitutional Court refused to take petitions into consideration if applicants failed to demonstrate a personal legal interest in bringing proceedings before the Court.[776] With art. 24 para. 2 CCA the demonstration of a legitimate interest was introduced explicitly as a requirement for the right to petition for the initiation of judicial review.

The existence of a legal interest to review a contested act of legislation has the legal nature of a procedural condition.[777] Further than that, the pertinent case-law of the Slovene Constitutional Court does not reveal a clear answer as to the function of legal interest as mere admissibility requirement for the submittal of complaints or as a requirement for the procedural legitimacy of the applicant and their status as party to the proceedings.[778] The Court's rigid interpretation of legitimate interest is seen as a trend towards a growing understanding of this requirement as prerequisite for procedural legitimacy.[779] This interpretation is supported by the requirement that the legal interest must not only be given at the time of the submittal of the petition but for the entire duration of the review proceedings. The Constitutional Court is therefore obliged to terminate the proceedings if this interest ceases to exist owing to changed legal or factual circumstances before it passes its final decision.[780]

As a consequence of the double objective of the legitimate interest as guarantee of access and as procedural requirement, the discretion of the legislator

776 Ruling U-I-59/1991 of 27 February 1992, OdlUS I, 12 (English translations available).

777 E.g. NERAD, Pravni interes, 42 ff.; MAVČIČ, Zakon o Ustavnem sodišču, 174.

778 See SLADIČ, 55; ZOBEC, 1090. The two functions of legal interest have been explained above in Chapter 1, pp. 12 f.

779 For a profound discussion on the functions of legal interest in Slovenia see ZOBEC, 1088 ff.; SLADIČ, 19 ff. and esp. 43 ff.

780 E.g. ruling U-I-97/2008 of 28 January 2009, n. 3, not published; ruling U-I-279/1995 of 18 January 1996, n. 3, OdlUS V, 7.

and the Constitutional Court in implementing and interpreting this legal institute is considerably restricted. They both face the challenge to find a balanced solution of a limited accessibility without thwarting individual access to constitutional adjudication. Accordingly, the requirement of the legitimate interest has been concretized and developed continuously since the enactment of the Constitution in 1991. Besides the statutory changes, the most significant contribution is to be accorded to the adoption of a rigid interpretation by the Constitutional Court itself.

b) Legal nature of the interest

The interest of the petitioner must be of a legal nature. The Constitutional Court states that

> «a legal interest is demonstrated if the impugned legal document affects the initiator's rights, obligations or legal benefits […]».[781]

Therewith, the Court excludes petitions filed based on purely personal sentiments.[782] It also rejects numerous petitions for concerns considered as purely political,[783] financial,[784] or commercial.[785] It also rejects several petitions because the alleged legal interests do not exist anymore at the time of their receipt.[786]

Noteworthy is the principle rejection of petitions filed by state authorities with regard to their constitutionally guaranteed competences. While the Constitutional Court considers decisions of the legislator to extend or restrict these powers as political,[787] it acknowledges a legal interest if contested legal provisions interfere with the constitutionally guaranteed independence of these authorities.[788] The Court accordingly accepted a petition filed by the Interior

781 (*Punctuation added*). Ruling U-I-24/1993 of 27 May 1993, Uradni list 35/93 and OdlUS II, 50 (English translation available).

782 E.g. ruling U-I-136/1992 of 11 February 1993, OdlUS II, 16 (English translation available); ruling U-I-92/2009 of 22 April 2011, n. 7, not published.

783 E.g. ruling U-I-123/1996 of 20 June 1996, n. 2, OdlUS V, 105.

784 E.g. ruling U-I-165/2011 of 3 May 2012, n. 4, not published.

785 E.g. ruling U-I-161/1994 of 13 October 1994, OdlUS III, 110.

786 See e.g. ruling U-I-85/2011 of 24 January 2014, n. 3, not published; decision U-I-28/2011 of 24 October 2013, n. 8, Uradni list 98/13.

787 E.g. ruling U-I-190/1999 of 29 June 2000, n. 3, OdlUS IX, 183. See also MAVČIČ, Zakon o Ustavnem sodišču, 178. TESTEN, Komentar Ustave art. 162, n. 28.

788 NERAD, Pravni interes, 45, 55.

Minister, who claimed that the prescribed surveillance by the Assembly over its activities was incompatible with the principle of separation of powers.[789]

c) Personal nature of the interest

aa) Consistent practice of the Constitutional Court

Already in its early practice the Constitutional Court emphasized that the legal interest of petitioners must be personal. It held that

> «[t]he legal interest must be individual and not a general and abstract interest, in defence of which any individual could appeal. The attribute of initiator can thus only be held by a person who successfully demonstrates that the impugned legal document defines *his own rights*, obligations or legal benefit.»[790]

The Court thus requires petitioners to demonstrate a qualified personal interest in comparison to the general legal interest of citizens and the society in the compliance of laws with the constitutional order.[791] Petitioners who are not personally addressed by a challenged law or regulation cannot demonstrate a personal legal interest.[792] The Constitutional Court even considers general allegations of unequal treatment as insufficient.[793] Because the personal nature excludes submittals of petitions on behalf of third persons, legal representatives must present an explicit authorization to act on behalf of their clients.[794]

Accordingly, the Constitutional Court strictly differentiates between the legal subjectivity and interests of legal entities and their members and employees. Local communities, political parties or societal associations who file petitions against laws or acts of legislation must demonstrate that these interfere with

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789 Decision U-I-383/1998 of 21 September 2000, n. 6, Uradni list 100/00 and OdlUS IX, 210. See e.g. also ruling U-I-281/2004 of 4 November 2004, n. 4, not published.

790 (*Italics added*). Ruling U-I-163/1992 of 18 March 1993, OdlUS II, 29; ruling U-I-159/1992 of 18 March 1993, OdlUS II, 27 (English translation available).

791 See for many ruling U-I-155/1994 of 9 November 1994, n. 3, OdlUS III, 121 (English translations available).

792 See for instance ruling U-I-197/2012 of 5 June 2013, n. 2, not published; ruling U-I-209/2011 of 9 February 2011, n. 5, not published.

793 Ruling U-I-279/2002 of 19 September 2002, n. 3, OdlUS XI, 183. See NERAD, Pravni interes, 47 f.

794 See for many ruling U-I-130/2015 of 19 November 2015, n. 3, not published.

their own legal positions.[795] Altruistic petitions filed by associations on behalf of their members are only accepted for consideration in two particular cases: On the one hand, this applies to petitions filed by associations, which were founded exactly with the purpose to protect the rights and interests of their members at stake. The mere fact that these associations operate for human rights protection in a general interest does not suffice.[796] Altruistic petitions can moreover be filed by environmental organisations for the protection of the environment as public good, if they were founded with the explicit purpose to protect the particular environmental matters at stake.[797]

bb) Broader understanding in exceptional cases

In certain cases the Constitutional Court adopts a broader understanding of the personal nature and acknowledges that a strict differentiation between personal and general interests is not feasible.

Noteworthy in this context is its case-law with respect to petitions filed against violations of democratic rights of citizens to participate in the exercise of public power and in legislative proceedings. If legislative authorities disregard election proceedings or fail to schedule popular votes in accordance with the proceedings prescribed for legislating, the Court recognizes a personal interest of all voters.[798] For the same reasons it also eliminated a decision of the National Assembly to schedule a referendum vote during holidays and only three weeks before the elections to the EU Parliament.[799]

Another example of an exceptionally broader interpretation of the personal interest is the Court's very controversial decision on the reintroduction of a

795 E.g. decision U-I-129/2010 of 10 November 2011, n. 4, Uradni list 95/11; ruling U-I-131/1994 of 16 March 1995, n. 3, OdlUS IV, 28 (English translation available).

796 See for many ruling U-I-165/2014 of 17 September 2014, n. 3, not published; decision U-I-240/2010 of 16 May 2013, n. 6, Uradni list 47/13; decision U-I-296/2002 of 20 November 2003, n. 6, Uradni list 68/94 and OdlUS XIII, 41 (English translation available); decision U-I-246/2002 of 3 April 2004, n. 10, Uradni list 36/03 and OdlUS XII, 24.

797 See e.g. decision U-I-43/2013 of 9 October 2014, n. 6, Uradni list 35/13, 76/14; ruling U-I-304/2011 of 10 January 2013, n. 5, not published.

798 See for many decision U-I-262/1997 of 22 October 1997, n. 4, Uradni list 67/97 and OdlUS VI, 134 (English translation available); ruling U-I-45/2009 of 12 March 2009, n. 4, Uradni list 22/09 and OdlUS XVIII, 11.

799 Decision U-I-76/2014 of 17 April 2014, n. 30, Uradni list 26/14, 28/14.

«Tito street» in Ljubljana.[800] Because of the highly symbolic value of the name Tito, standing for a regime of gross human rights violations, the Constitutional Court not only acknowledged a personal interest of political prisoners but of all citizens with regard to their right to human dignity.[801]

Finally, a less rigid interpretation of personal concern can also be found with respect to building and zone plans contested for violating the right to a healthy living environment.[802]

d) Concrete legal interest

As further criteria the Constitutional Court requires petitioners to demonstrate a concrete legal interest in bringing judicial review proceedings. This requires the proof of a concretely existing need for protection against present or against imminent violations by a legal act.[803] Allegations that the contested provision might one day negatively interfere with the petitioners' legal status are rejected by the Constitutional Court as merely hypothetical or speculative.[804]

e) Direct nature of the legal interest

aa) Immediate legal effect of legal provisions

In almost every ruling by which the Constitutional Court rejects petitions it states that

> «[t]he petitioner does not have a legal interest, if he does not prove that the challenged provision directly interferes with his legal position.»

While the evaluation of a direct legal interest belongs to its main occupations in assessing the admissibility of petitions, this requirement has been subject to the most comprehensive changes. Given the general and abstract nature of

800 Decision U-I-109/2010 of 26 September 2011, Uradni list 78/11 and OdlUS XIX, 26 (English translation available). Note as well the dissenting opinion to this decision.

801 Decision U-I-109/2010, nn. 4 and 6 ff., see above at fn. 800.

802 See e.g. decision U-I-315/1997 of 16 March 2000, n. 23, Uradni list 13/98, 31/00 and OdlUS IX, 57; decision U-I-30/1995 of 21 December 1995, n. 9, Uradni list 3/96 and OdlUS IV, 126 (English translation available).

803 See decision U-I-425/2006 of 2 July 2007, Uradni list 55/09 and OdlUS XVIII, 29; decision U-I-125/1995 of 3 December 1998, Uradni list 1/99 and OdlUS VII, 215 (English translation available).

804 See for many ruling U-I-242/2012 of 10 January 2013, n. 4, not published; ruling U-I-10/1996 of 27 February 1997, n. 4, OdlUS VI, 28.

legislative acts, the Constitutional Court recognizes a direct legal effect for individuals only under strict conditions. Accordingly, the proof of an immediate effect requires that a provision

> «imposes a clear and unambiguous obligation which does not need any interpretation and which is not conditional upon the adoption of a further regulation or the issuing of an individual act.»[805]

This for instance applies to provisions which restrict rights and liberties to an extent that undermines their essence.[806] Illustrative are several communal decrees, which were invalidated by the Constitutional Court for declaring parcels in private ownership as public streets.[807]

Typically however, legislative provisions leave a margin of appreciation for their application onto the concrete actual and legal circumstances of each individual case. Initially the Constitutional Court acknowledged a direct legal interest only if petitioners contested such legislative acts in relation to a concrete individual act passed in their application.[808] As consequence of the considerable amount of petitions received, the Constitutional Court adopted an ever more rigid approach[809] and finally changed its practice in 2007.

bb) Adoption of rigid interpretation

By a fundamental change of practice in 2007 the Constitutional Court predicated the demonstration of a direct legal interest on the submittal of a constitutional complaint against the individual act passed in application of the contested legal provision.[810] Shortly after the Court confirmed this practice by invoking its indispensability for the realization of the primary constitutional responsibility of the judiciary to protect the Constitution.[811] It emphasized that the required immediacy of the legal interest would not restrict its accessibility

805 SLADIČ, 37 f.; ZOBEC, 1095 f.

806 SLADIČ, 42 f.; ZOBEC, 1097 f.

807 E.g. decision U-I-156/2013 of 4 June 2015, Uradni list 43/15; decision U-I-194/2012 of 24 April 2014, n. 8, Uradni list 33/14. For other illustrative examples see decision U-I-37/2012 of 8 May 2014, n. 4, Uradni list 36/14; decision U-I-73/2012 of 6 March 2014, n. 4, Uradni list 19/14.

808 See e.g. ruling U-I-8/1994 of 30 June 1994, para. 3, OdlUS III, 78 (English translation available). For more details see NERAD, Pravni interes, 48 ff.

809 Ruling U-I-74/2003 of 23 October 2003, nn. 5 f., Uradni list 108/03 and OdlUS XII, 84. Critical to this change of practice NERAD, Pravni interes, 67 f.

810 Ruling U-I-325/2005 of 27 September 2007, n. 3, Uradni list 91/07 and OdlUS XVI, 72.

811 This explanation can also be found in the Court's Annual Report of 2007, 24.

to individuals but postpone it to the moment when they could not achieve protection by the courts any more.[812] By confirming this new practice in several following rulings,[813] the Constitutional Court corroborated the definite change in interpreting the requirement of direct legal interest.

As a result of this change of practice petitions filed against laws and other acts of legislation and constitutional complaints as remedies against rights violating individual acts must correlate with each other both in a procedural and in a contextual aspect. This is shown by the fact that the Court assesses the admissibility of both remedies in one and the same proceedings and decides on their merits as «related matters» by one and the same ruling or decision.[814] Accordingly, the applicant bears the burden of proof that

> «a possible approval of the petition would lead to an improvement of his legal position.»[815]

cc) Prospect of improvement of the legal position

So as to substantiate the required prospect of improvement petitioners must not only fulfil the admissibility requirements for filing petitions but, additionally, they must meet the requirements for the admissibility of constitutional complaints. In practice this has aggravated individual access to the Constitutional Court of Slovenia to a considerable extent.

A frequent reason for the rejection of petitions is the failure of applicants to submit constitutional complaints together with the petitions. Besides, petitions are often rejected for being submitted after constitutional complaints have been approved by the Constitutional Court or dismissed for being unfounded.[816] Noteworthy are the cases in which petitions are filed against legal provisions, for instance on the reduction of state benefits or the raise taxes or charges, before these provisions are adopted by individual acts, which can be

812 Ruling U-I-330/2005 et al. of 18 October 2007, nn. 5 f., Uradni list 101/07 and OdlUS XVI, 79.

813 E.g. ruling U-I-275/2007 of 22 November 2007, n. 3, Uradni list 110/07 and OdlUS XVI, 82; ruling U-I-174/2007 of 16 April 2009, n. 2, not published.

814 See Annual Report 2012, 35.

815 Ruling U-I-102/2010 and Up-535/2010 of 12 December 2011, n. 3, not published.

816 See e.g. ruling U-I-124/2013 and Up-404/2013 of 17 April 2015, n. 6, not published; ruling U-I-169/2014 and Up-959/2014 of 22 September 2014, n. 4, not published; decision U-I-234/2012 and Up-879/2012 of 24 April 2014, n. 11, Uradni list 35/14.

contested by constitutional complaints.[817] For not entailing an immediate legal effect either, the Constitutional Court moreover rejects numerous petitions filed against spacial plans[818] and even such which are filed against provisions that regulate criminal offences and criminal procedures.[819] This rigid interpretation has led to many critics also from among the own ranks of the Court, which invoke that petitioners contesting these provisions are forced to first breach them and to risk fines and sanctions before being able to demonstrate their direct concern.[820]

In practice the most frequent reason for rejecting petitions appears to be the failure to additionally fulfil the procedural requirements prescribed for submitting constitutional complaints.

First and foremost, the circle of applicants entitled to submit constitutional complaints is considerably narrower. While entitled to file petitions on behalf of the rights of their members or of the environment, such associations cannot file constitutional complaints.[821]

Another considerable hurdle is posed by the principle of subsidiarity which, as a consequence of the correlation between the complaints, applies to petitions as well.[822] Frequently, petitions are rejected because the petitioner did not exhaust all available legal remedies against the individual act adopted in application of a contested legal provision.[823] Most importantly however, the requirement to exhaust legal remedies in a substantial aspect obliges petitioners to object to the constitutionality of a legal provision already before the courts of lower instance. This implies that the normative inconsistency which

817 See for many ruling U-I-246/2012 of 19 November 2012, n. 4, not published; ruling U-I-204/2012 of 1 October 2012, n. 3, not published; ruling U-I-160/2011 et al. of 15 May 2012, n. 3, not published.

818 E.g. ruling U-I-169/2012 of 13 November 2014, n. 3, not published; ruling U-I-45/2012 of 21 October 2013, n. 3, not published.

819 E.g. ruling U-I-98/2013 and Up-1161/2012 of 22 May 2013, n. 4, not published; decision U-I-186/2009 and Up-878/2009 of 28 September 2011, Uradni list 85/11 and OdlUS XIX, 25 (English translation available).

820 E.g. dissenting opinions of judges Marija Kramberger and Miroslav Mozetič in ruling U-I-54/2006 of 27 May 2009, n. 7, above at fn. 505. See also Zobec, 1094 f.

821 The Court emphasized this in ruling U-I-152/2011 of 24 May 2012, n. 5, not published.

822 Sladič, 51 f. See to this effect also Nerad, Komentar Ustave art. 162, n. 39.

823 See e.g. ruling U-I-70/2015 of 15 June 2015, n. 4, not published; ruling U-I-171/2013 and Up-571/2013 of 24 July 2015, n. 4, not published.

is alleged by petition before the Constitutional Court has been invoked before each single judicial instance they must apply to.[824]

As consequence of the time limit for submitting constitutional complaints, petitioners who fail to file a valid complaint during this period, fail to prove their direct legal interest. Amounting to an implicit temporal restriction for petitions, legal scholars speak of a «hidden» introduction of a time limit.[825] In practice numerous petitions are rejected because the constitutional complaints have not been submitted timely.[826]

Finally, also the mentioned concept of triviality became decisive for the admissibility of petitions.[827] Unless they raise important constitutional questions which exceed the importance of the concrete case, petitioners cannot demonstrate their direct concern with respect to provisions constituting the legal basis for small-claims disputes, for decisions on court fees, trespass to property disputes and against decisions issued in misdemeanour proceedings or with respect to other interferences that are not considered as intense.[828] Consequently, the Court's decision on the triviality of rights violations is indirectly decisive for the acknowledgment of a direct legal interest of petitioners.

f) Need for legal protection

Besides the heretofore explained demonstration of a personal qualified concern of petitioners, the Constitutional Court assesses whether

> «a possible substantial decision […], by which it would declare the unconstitutionality of the assessed regulation, would affect the legal position of the petitioner.»[829]

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824 E.g. ruling U-I-59/2014 and Up-1122/2012 of 15 October 2015, n. 19, see above at fn. 769; See also decision U-I-275/2010 and Up-1507/2010 of 19 April 2012, n. 17, Uradni list 36/12. For more details see SLADIČ, 54 f.

825 ČEBULJ, Pobuda za ustavnosodno presojo, 1006.

826 See for many ruling U-I-98/2013 and Up-1161/2012 of 22 May 2013, n. 4, not published; ruling U-I-177/2008 and Up-1900/2008 of 10 September 2009, n. 9, not published.

827 See above at Chapter 2, pp. 96 f.

828 E.g. ruling U-I-21/2014 and Up-68/2014 of 22 September 2014, nn. 3 f., not published; ruling U-I-238/2013 and Up-825/2013 of 3 December 2013, n. 3, not published.

829 (*Punctuation added*). See e.g. ruling U-I-115/1999 of 31 January 2002, n. 6, OdlUS XI, 14.

The need for legal protection constitutes an additional prerequisite for the admissibility of petitions.[830] Some scholars even require that the decision of the Court must be *indispensable* for the improvement of the legal position of the petitioner.[831]

Besides its endeavour to fortify its subsidiary protective role this shows the efforts of the Constitutional Court to limit its accessibility to individuals to cases in which it can offer effective protection of their rights.[832] For petitioners, however, it therewith established an extra procedural hurdle, obliging them to additionally substantiate their petitions with a concrete prospect of improvement of their legal positions.

The Constitutional Court assesses in every individual case whether or not its decision on the constitutional complaint could effectively improve the petitioner's legal position.[833] If it can merely abrogate an unconstitutional provision it rejects petitions for the impossibility of an improvement of the legal positions of the applicants whose rights have been decided by final act.[834] If, on the other hand, requirements for an annulment of contested provisions are fulfilled it recognizes a prospect of improvement because applicants can claim the reconsideration of final individual acts and decisions.[835]

At this point it is noteworthy that the restrictive approach of the Slovene Constitutional Court in this respect has led to several decisions which are questionable with respect to an effective protection of constitutional rights and with its role and function as guarantor of the constitutional guarantees. It for instance rejected a complaint of an asylum seeker against a final order of extradition and his petition filed against the respective legal provision with the argument that, with his extradition to France, his legal position could not be improved anymore by a decision establishing the violation of his rights.[836] Another illustrative example is the rejection of a constitutional complaint filed against a refusal to elect the applicant to judicial service and of his petition

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830 MAVČIČ, Slovenian constitutional review, 65; NERAD, Komentar Ustave art. 161, n. 37.

831 See NERAD, Pravni interes, 55; SLADIČ, 28 with respective references.

832 TESTEN, Komentar Ustave art. 161, nn. 19 f.

833 Detailed in NERAD, Pravni interes, 52 ff.

834 E.g. KRIVIC, Ustavno sodišče, 145; NERAD, Komentar Ustave art. 161, n. 10, with references to pertinent decisions.

835 In ruling U-I-72/2001 of 20 May 2004, n. 6, not published, it however considered the one year term for the submittal of reconsideration requests as expired.

836 Ruling U-I-5/2011 and Up-5/2011 et al. of 15 September 2011, nn. 3 ff., not published. See also ruling Up-1840/2007 of 15 January 2009, n. 6, not published.

against the provision restricting the eligibility to 70 years of age. The Court justified its decision stating that, by reaching the age limit during the proceedings, the applicant lost its eligibility and therewith his prospect of improvement of his legal position.[837] Based on similar grounds, the Constitutional Court rejected the legal interest of a petitioner who, once he fulfilled the minimum age of 40 years, became eligible as candidate and therewith lost his legal interest to contest the legally prescribed minimum age.[838]

C. Requirements of form and substance

a) Form and content of petitions

Petitions must be submitted to the Constitutional Court in written form and Slovenian language and filed together with the documents relevant for the substantiation of alleged unconstitutionalities.[839] Anonymous petitions are not taken into consideration. Rather, petitioners must indicate their full name and domicile and provide their signature.[840] Submittals filed by legal persons must additionally present a proof of their legal status.[841] With the published templates for petitions on its website, the Constitutional Court considerably facilitated the compliance with these formal criteria.[842]

The requirements regarding the content are prescribed by art. 24b CCA and the Annex of the Rules of Procedure. The Constitutional Court requires petitions to be comprehensible. Therewith, it explicitly excludes general allegations of unconstitutionality or blanket statements.[843] Besides the precise designation of the contested provisions and the legal or constitutional provisions deemed to be violated, petitioners must clearly substantiate the grounds for every alleged incompatibility. The fact that the Court rejects a great number of petitions which refer to the substantiations of the alleged rights violation in

837 Ruling U-I-303/2007 of 20 March 2008, n. 6, not published.
838 See ruling U-I-37/2004 of 15 April 2004, n. 4, not published.
839 Art. 22 para. 1 CCA Slovenia and art. 35 paras. 1 and 2 RoP Slovenia.
840 E.g. ruling U-I-5/2014 of 4 February 2014, n. 2, not published.
841 See ruling U-I-56/2011 of 20 April 2011, n. 1 f., not published.
842 The templates are published in Slovene language on <http://www.us-rs.si/vloge/vsebina-in-obrazci/> (last accessed September 2018).
843 NERAD, Komentar Ustave art. 160, n. 42. E.g. ruling U-I-108/2014 et al. of 19 September 2014, nn. 3 f., not published; ruling U-I-143/2012 of 11 April 2013, n. 2, not published.

the simultaneously filed constitutional complaints shows the stringent application of this requirement in practice.[844]

In order to demonstrate their legal interest, petitioners must provide the information and documents to show a direct interference of contested provisions with their rights and substantiate that their abrogation would lead to the improvement of their legal position. A frequent reason of rejection is the failure to verify the additional fulfilment of the conditions for the submittal of constitutional complaints. This particularly applies to the failure to prove that alleged incompliances of contested provisions have already been asserted before the administrative and judicial bodies.[845]

The analysis of the pertinent practice shows that the Constitutional Court has put very high demands on the substantiation of a legal interest already from the beginning. It namely requires that

> «it is *obvious* that the petitioner's personal or direct interest, which is recognized and protected as such by law, is concerned».[846]

This implies that petitioners make their legitimate interest clearly evident to the Constitutional Court.[847]

b) Improvement of insufficient and unclear petitions

If necessary, petitions that are not manifestly inadmissible or evidently unsuccessful can be returned to the applicant for correction on the basis of art. 38a para. 2 RoP. The petitioners are informed about the formal deficiencies of their submittals and invited to improve or supplement these within a predetermined period of time. The failure to comply with these conditions implies that petitions are considered as not being filed and consequently do not produce any legal effect.

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844 E.g. ruling U-I-55/2009 and Up-257/2009 of 24 January 2011, n. 4, Uradni list 14/11.

845 E.g. ruling U-I-23/2010 of 19 September 2012, n. 3, not published; ruling U-I-6/2007 of 6 February 2008, n. 2, not published.

846 (*Italics added*). See for instance ruling U-I-105/1995 of 10 July 1995, n. 5, OdlUS IV, 70 (English translations available).

847 See NERAD, Pravni interes, 43. For MAVČIČ, Zakon o Ustavnem sodišču, 174 a «bigger or smaller probability» of a direct interference with their rights suffices.

D. Temporal restrictions

As has been shown, implicit time limits for the submittal of petitions against laws and other acts of legislation without immediate legal effect were the result of the required correlation with constitutional complaints. Accordingly, the compliance with the 60 days term prescribed for the filing of constitutional complaints became decisive for the admissibility of petitions.[848] Besides, one can establish another implicit time limit. So as to prove the need for legal protection petitioners, whose rights are violated by a final individual act or decision adopted on contested provisions, must be able to file a timely request for reconsideration to the responsible authority. They lose prospect of improvement if they fail to file the petition within one year from the adoption of the individual act.[849]

An explicit time limit of one year has been introduced in 2007 with art. 24 para. 3 CCA for petitions filed against regulations and general act with an immediate legal effect. The Constitutional Court differentiates two components of this time limit. It primarily assesses the compliance with the «objective time limit» of one year starting with the day of enactment of the contested provision and its publication. In case of negative consequences that occur only after the enforcement of a contested provision, the Court assesses the compliance with the «subjective time limit» starting on the day a petitioner learns about these consequences.[850] In the latter case, the petitioners are required to demonstrate that they could only learn about the negative consequences after the enactment of a regulation. The Constitutional Court rejects numerous petitions stating that by consulting relevant official publications, websites or documents of the responsible authorities, the applicants could have recognized negative consequences already with the enactment of respective regulations.[851]

E. Cost burden

As has been shown, proceedings before the Slovene Constitutional Court are free of charge. They are neither contingent on the payment of court fees nor

848 See above p. 150.

849 To this effect see ruling U-I-72/2001 of 20 May 2004, n. 6, not published.

850 E.g. ruling U-I-267/2010 of 15 November 2012, n. 4, Uradni list 90/12.

851 See for many ruling U-I-314/2013 of 7 January 2015, n. 3, not published; ruling U-I-78/2012 of 18 September 2014, n. 5, not published.

on an additional cost burden by compulsory legal representation.[852] Yet, based on art. 34 para. 1 CCA, the Constitutional Court can impose all expenses and costs incurring during the proceedings to one party based on reasonable grounds. It accordingly imposed all costs to local communities responsible for declaring parcels in private property as public streets after it had already abolished numerous identical decrees for violating the guarantee of ownership.[853] As measures to reduce the number of submittals the Court can impose sanctioning fees for the submittal of frivolous or vexatious applications or for the failure of attorneys at law to comply with the formal requirements. To the knowledge of the author, the Court did not order any such fees so far.

F. Requirements regarding the quality of cases

Even if petitions comply with the above described procedural requirements, the Constitutional Court can still dismiss them for being

> «manifestly unfounded or if it cannot be expected that an important legal question will be resolved.»[854]

a) Manifestly unfounded petitions

Because of its power to not take into consideration petitions which it considers as manifestly unfounded, the Constitutional Court assesses allegations of unconstitutionality or unlawfulness of contested provisions already at the preliminary stage of the proceedings.

Prescribed as a requirement for the admissibility of petitions, the Constitutional Court is not obliged to conduct a profound analysis of the foundedness of the arguments raised. While the legislator did not concretize the existence of a manifest unfoundedness, legal doctrine holds that this is the case if such is «practically obvious to every lawyer and beyond.»[855] However, the analysis of the pertinent case-law reveals no clear differentiation between the rejections of petitions for being manifestly unfounded and of their dismissal for being unjustified after their assessment on the merits.

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852 With respect to constitutional complaints see above at Chapter 2, pp. 95 f.

853 E.g. decision U-I-194/2012 of 24 April 2014, n. 9, see above at fn. 807; decision U-I-61/2011 of 6 July 2011, n. 8, Uradni list 60/11. See also decision U-I-305/2012 of 10 July 2014, n. 7, Uradni list 58/14.

854 Art. 26 para. 2 CCA Slovenia.

855 KRIVIC, Ustavno sodišče, 97 f.

b) Absence of important constitutional questions

Already with the enactment of the CCA in 1994, the legislator in art. 26 para. 2 introduced the requirement that petitions must raise important constitutional questions. In numerous rulings, the Court invokes the irrelevance of petitions for raising mere financial issues,[856] or questions of a political nature.[857]

In cases where the demonstration of a direct concern requires the submittal of a valid constitutional complaint against a decision or act passed in application of a contested provision, the Constitutional Court requires that the constitutional question raised by the petition corresponds to the one decisive for the admissibility of the constitutional complaint.[858] The frequent rejection of petitions because of the irrelevance of the questions raised by constitutional complaints indicates the difficulty for petitioners to fulfil this additional criterion.[859]

In this context it should be noted that the dismissal of constitutional complaints and of petitions for not raising any important constitutional questions is an effective means for the Court to reduce its workload already at the stage of preliminary proceedings. On the other hand, it limits its accessibility to individuals to a considerable extent. In its proposal for constitutional amendments filed in 2009 the Government stated that this does not change the obligation of the Constitutional Court to consider every submittal and to assess the admissibility of petitions in each individual case.[860] However, several legal scholars claim that it opens a substantial scope of discretion to the Court in accepting petitions for consideration.[861] While it could provide a certain comprehensibility of its rulings by a clear statement of reasons, the relevant case-law reveals that the Court only invokes the irrelevance of constitutional questions in general without explaining its findings on the basis of the concrete facts of each case.

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856 E.g. ruling U-I-61/2012 of 8 May 2014, n. 2, not published; ruling U-I-227/2011 of 2 April 2013, n. 2, not published.

857 E.g. ruling U-I-99/2014 of 8 May 2014, n. 2, not published; ruling U-I-221/2011 of 17 February 2012, n. 2, not published.

858 E.g. ruling U-I-49/2015 and Up-238/2015 of 15 October 2015, n. 4, not published.

859 Instead of many see ruling U-I-26/2013 and Up-107/2013 of 26 June 2013, n. 3, not published; ruling U-I-168/2012 and Up-642/2012 of 11 April 2013, n. 3, not published.

860 See Proposal for constitutional amendments of articles 160, 161 and 162 of 2009, 19.

861 KAUČIČ/PAVLIN/BARDUTZSKY, 41; MAVČIČ, Zakon o Ustavnem sodišču, 176; TESTEN, Tehnike ustavnosodnega odločanja, 222.

G. Procedural obstacles

a) Principle of res iudicata

Art. 1 para. 3 CCA and art. 41 para. 4 CCA prescribe the finality and binding effect of decisions and rulings of the Constitutional Court. Therewith, appeals against the Courts' decisions and rulings and the possibility to reopen proceedings to reconsider its judgments are explicitly excluded in accordance to the principle of res iudicata. Also the Constitutional Court must adhere to its own decisions. It accordingly rejected an appeal for reconsideration filed on the basis of an ECtHR judgment which confirmed the violation of the appellant's rights to fair trial for not having been invited to participate in constitutional complaint proceedings.[862] It moreover frequently rejects petitions as manifestly unfounded or for the lack of a legal interest because they are filed against already reviewed provisions.[863]

Yet, the analysis of its case-law reveals that the Slovene Court does not generally refuse to reconsider its rulings or decisions. It predicates a reassessment on the presentation of new reasons which have not been considered in earlier judgments or on the assertion of new important constitutional questions.[864] In practice the failure to assert reasons for reconsideration leads to the rejection of a vast number of petitions.[865]

b) Withdrawal or lapse of procedural requirements

Art. 25 para. 4 CCA prescribes the compulsory conclusion of the review proceedings upon the withdrawal of petitions during the review proceedings. The Constitutional Court accordingly emphasizes that

> «the applicant is *dominus litis* of the process – not only when submitting its application, but also thereafter.»[866]

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862 Ruling U-I-223/2009 and Up-140/1992 of 14 April 2011, nn. 14 ff., Uradni list 37/11 and OdlUS XIX, 21 (English translation available) in relation to jugment *Gaspari vs. Slovenia*, 21055/03, 21 July 2009.

863 Compare e.g. ruling U-I-57/1996 of 21 January 1999, n. 10, OdlUS VIII, 18 and ruling U-I-102/2011 and U-I-110/2011 of 8 March 2012, n. 3, not published.

864 Detailed in TESTEN, Komentar Ustave art. 161, nn. 5 f.

865 See for many ruling U-I-256/2013 and Up-875/2013 et al. of 3 December 2014, n. 6, not published; ruling U-I-319/2011 of 24 May 2012, n. 4, not published.

866 Ruling U-I-169/2008 of 22 October 2009, n. 2, not published.

The Court is consequently neither entitled to initiate nor to continue review proceedings even if it considers them as necessary for the protection of the constitutional order. In contrast to its Croatian counterpart, the withdrawal of a petition during the review proceedings therefore constitutes an absolute obstacle for the continuation of the review proceedings.

Also the admissibility requirements must be fulfilled for the entire duration of the proceedings and until the Court's final decision. The loss of the legal interest of petitioners and consequently of its procedural legitimacy prevents the Court from continuing to review contested provisions.[867] In several rulings it considered the legal interest of petitioners as ceased because of changed circumstances during the proceedings, such as the expiry of employment or by reaching a certain age.[868]

However, art. 24b para. 3 CCA obliges the Constitutional Court to summon the petitioners so as to allow them to demonstrate the persistence of their interests in the continuation of the review proceedings. It ends the proceedings if the petitioners fail to prove their continued legal interest within the predetermined period of time. As to art. 47 para. 2 CCA the same applies if contested provisions cease to be effective during the review proceedings.[869] In any case, the persistence of negative consequences must be proven by presenting respective evidences.[870]

H. Examination of the merits

As has already been mentioned, the analysis of the pertinent case-law reveals that the Constitutional Court does not differentiate when rejecting manifestly unfounded petitions for being inadmissible and their dismissal as result of an assessment on the merits. Just as its Croatian counterpart also the Slovene Court accordingly assesses the substantiation of allegations at the same procedural stage as the admissibility requirements and decides on the merits of the complaint without first closing the preliminary proceedings by ruling.[871]

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867 See e.g. ruling U-I-97/2008 of 28 January 2009, n. 3, not published; ruling U-I-242/2000 of 10 April 2003, n. 5, OdlUS XII, 34.

868 See for many ruling U-I-303/2007 of 20 March 2008, n. 6, not published; ruling U-I-37/2004 of 15 April 2004, n. 4, not published. See also SLADIČ, 51.

869 Decision U-I-25/2014 and Up-1303/2011 of 21 March 2014, n. 8, Uradni list 25/14. See also decision U-I-58/2012 of 2 October 2013, n. 6, Uradni list 30/12.

870 E.g. ruling U-I-9/2012 of 24 September 2013, n. 3, not published.

871 For more details in this respect see KRIVIC, Ustavno sodišče, 96 ff.

If, in these cases, the Court considers the substantiations as founded, it concludes the proceedings and invalidates the contested legal provisions by final decision. If, on the other hand, it finds that contested provisions are not in breach of the Constitution or the laws or that the allegations do not raise doubts regarding their constitutionality or legality, it rejects petitions by rulings rather than by formal decisions. As a consequence, rulings are conceded the same final and legally binding effects as formal decisions.

This practice is considered as problematic as it prevents the holding of adversary proceedings and the possibility of petitioners to make use of their participatory rights as prescribed only for main procedures.[872]

3. Status of petitioners in review proceedings

Also in Slovenia the judicial review proceedings are combined with several procedural elements that guarantee and improve the status of petitioners in the proceedings.

A. Participatory rights of petitioners

a) Applicability of Convention standards for fair proceedings

The ECtHR confirmed the applicability of the Convention guarantees for constitutional complaint proceedings before the Slovenian Constitutional Court at several instances.[873]

The criteria established by the ECtHR for the applicability of standards of fair trial, namely a victim status or a close interrelation with civil and criminal law proceedings, seem to apply to judicial review proceedings initiated upon petitions of individuals as well. This seems, at least implicitly, to be confirmed by judgment *Kurić and others vs. Slovenia*, where the ECtHR stated that the complainants were not required to file an additional petition to the Constitutional Court after the failure of the legislator to comply with its judgment on the «Erasure-Laws» initiated upon petitions of the persons concerned.[874]

872 KRIVIC, Ustavno sodišče, 135; TESTEN, Tehnike ustavnosodnega odločanja, 221 f.

873 See e.g. judgments *Suhadolc vs. Slovenia*, 57655/08, 17 May 2011 and *Gaspari vs. Slovenia*, above at fn. 862.

874 See *Kurić and others vs. Slovenia*, 26828/08, 26 June 2012, §§ 305–307.

Several factors indicate a subjective and adversary nature of the judicial review proceedings in Slovenia.[875] Firstly, this seems to hold true with respect to the function of the legal interest as requirement for the procedural legitimacy of petitioners. Secondly, the subjective nature of review proceedings is indicated by the *dominus litis* position of applicants, namely the dependence of review proceedings on the filing and withdrawal of valid requests or petitions and on the persisting entitlement of applicants.

b) Participatory rights of petitioners

As structural elements for fair trials participatory rights of petitioners can be found in judicial review proceedings before the Slovene Constitutional Court as well. Petitioners have accordingly been endowed with a mandatory right to *information* and *inspection*. They are entitled to receive information about the Court's rulings with respect to the acceptance of their petitions for consideration and about the reasons for their rejection. During the proceedings petitioners are moreover entitled to request information about the status of ongoing proceedings and to consult and copy documents, opinions, observations and all other files relevant for the decision of the Constitutional Court.[876] The right to information is finally ensured by the obligation of the Court to notify the petitioners about the outcome of the proceedings.

Under certain conditions petitioners are also entitled to *participate* in the review proceedings. As to art. 35 para. 1 CCA it is principally at the Court President's discretion whether or not to schedule public hearings. The discretion is however limited by art. 38 para. 1 CCA as to which the President must present justified reasons if he or she decides to exclude the public from hearings pursuant. Petitioners are invited to attend these hearings and to issue statements that substantiate alleged interferences of contested provisions with their rights and interests. Yet, their absence in scheduled public hearings does not prevent the Court from passing its final decision.[877]

In accordance with the case-law of the ECtHR the lack of a claimable right to participate or to be heard is consistent with the Convention because of the particular nature of proceedings before constitutional courts.[878] In order not to

875 See also KRIVIC, Ustavno sodišče, 135, 139; MAVČIČ, Zakon o Ustavnem sodišču, 198.
876 Art. 4 para. 1 CCA Slovenia and art. 24 and 26 RoP Slovenia.
877 Art. 36 para. 2 CCA Slovenia and art. 51 ff. RoP Slovenia.
878 See above at Chapter 1, pp. 40 f.

violate the standards of fair trial the Constitutional Court must however always take into account the circumstances of each concrete case and schedule public hearings if petitioners were not granted opportunity to participate and to be heard in proceedings before lower instances.

B. Limited power to extend the scope of assessment

As a rule, the scope of review of the Slovene Constitutional Court is predefined by the received requests and petitions. This is not least a consequence of the *dominus litis* position of applicants and the lack of competence of the Court to initiate and to continue review proceedings at its own discretion. In consistent practice it therefore confines its review to the provisions contested by the petitions and assesses only the inconsistencies alleged.[879]

Yet, also the Slovene Court can, to a certain extent, extend the chances of success of petitions. Pursuant to art. 30 CCA it is empowered to review other provisions

> «that are mutually related or if such [extension] is necessary to resolve the case.» (*Insertion added*)

By its «competence by connectivity»[880] the Constitutional Court for instance extends its assessment to provisions that constitute an integral whole with the contested norms.[881] Based on its «competence by necessity» the Court reviewed the constitutionality of provisions defining and regulating the financing of public universities before assessing a contested governmental decree which restricted study places of extraordinary students.[882] In another case it acknowledged a necessity to extend its review in order to prevent further claims for reconsideration and the application of respective provisions in renewed criminal proceedings.[883]

On the other hand, the Constitutional Court as a principle refuses to review a contested provision for other reasons of unconstitutionality than those alleged

879 NERAD, Komentar Ustave art. 160, n. 42.

880 E.g. KRIVIC, Ustavno sodišče, 158 f.; MAVČIČ, Zakon o Ustavnem sodišču, 197.

881 E.g. decision U-I-211/2011 of 24 May 2012, n. 7, Uradni list 43/12; decision U-I-135/2000 of 9 October 2002, nn. 17 and 23, Uradni list 50/02 and OdlUS XI, 211.

882 Decision U-I-156/2008 of 14 April 2011, n. 21, Uradni list 34/11.

883 Decision U-I-289/1995 of 4 December 1997, n. 14, Uradni list 5/98 and OdlUS VI, 165 (English translation available).

by the applicant.[884] Yet, in individual decisions, it extended its review to aspects relating to the principles of equality and the rule of law.[885]

4. Achievement of subjective rights protection

The analysis of the particular procedural arrangements of judicial review proceedings in Slovenia reveals features that support the qualification of petitions as legal remedies for subjective protection. As consequence of the required personal and direct concern their personal legal position is improved either directly by the elimination of unconstitutional or unlawful provisions or indirectly by a subsequent abolition of individual acts passed in application of such provisions. The procedural instruments which provide petitioners with such personal benefits are presented in the following.

A. Suspension of applicability of laws

On the basis of art. 161 para. 1 Constitution and art. 39 CCA the Constitutional Court orders the temporary suspension of the applicability of a reviewed law or regulation if it considers this necessary to prevent harmful consequences which result from the lack of a suspensive effect of proceedings opened.[886] What is more, the Slovene Court is vested with a certain legislative authority to temporarily regulate legal questions in order to prevent legal loopholes for the duration of the temporary suspension. At several instances it accordingly ordered the temporary application of analogous legal norms until passing its final decision on the constitutionality or lawfulness of contested provisions.[887]

The preventive suspension of applicability of reviewed legal provisions can be ordered only for the duration of the review proceedings, starting with the acceptance of a petition for consideration and ending with the adoption of a

884 E.g. decision U-I-141/2001 of 20 May 2004, n. 8, Uradni list 62/04 and OdlUS XIII, 35.

885 E.g. decision U-I-135/2000 of 9 October 2002, nn. 30 and 40, Uradni list 50/02, 93/02 and OdlUS XI, 211.

886 For a detailed description of this power see e.g. MAVČIČ, Slovenian constitutional review, 51 ff.; TESTEN, Komentar Ustave art. 161, nn. 37 ff.

887 See e.g. ruling U-I-67/2013 of 18 April 2013, n. 5, Uradni list 39/13, 17/14; ruling U-I-339/1998 of 14 October 1998, n. 4, Uradni list 72/98, 11/99 and OdlUS VIII, 13.

final decision on the compatibility of the reviewed provisions with the Constitution or the laws.[888] During the review proceedings the order of suspension can be revoked at any time for becoming groundless due to changed circumstances.[889] As a rule, the Constitutional Court orders suspensions on request of petitioners. These must substantiate the existence of a concrete threat of harmful consequences and the necessity of preventive measures.[890] Whether or not a petition has a prospect of success is irrelevant for the Court's decision.[891]

When ordering the suspension of applicability the Constitutional Court takes into account possible disadvantages for the legal order, the legal positions of other persons or for the general public.[892] Its decisions thus always comprise a balancing of interests.[893] Considering their application as more harmful for the petitioners, the Constitutional Court for instance ordered the temporary suspension of provisions prescribing the disclosure of sensitive personal data of patients in psychiatric clinics,[894] provisions that entailed harmful financial disadvantages[895] or provisions on the holding of popular votes.[896] It also ordered the temporary suspension of numerous building and zone plans, whose enforcement entailed serious encroachments onto the landscape.[897] On the other hand, the Court refused to order the temporary suspension of a provision on the transfer of local autonomy, because this would have amounted to a legal gap in the regulation of divisions of competences between the state and local entities.[898]

888 TESTEN, Komentar Ustave art. 161, n. 40.
889 E.g. ruling U-I-220/2003 of 24 November 2003, n. 7, Uradni list 117/03 et al. and OdlUS XIII, 61.
890 E.g. ruling U-I-251/2000 of 19 October 2000, nn. 2 f., Uradni list 50/02 and OdlUS XI, 86.
891 KRIVIC, Ustavno sodišče, 162; NERAD, Komentar Ustave art. 161, n. 65.
892 See e.g. ruling U-I-151/2011 of 14 September 2011, n. 3, Uradni list 74/11; ruling U-I-65/2011 of 21 April 2011, n. 4, Uradni list 36/11.
893 TESTEN, Komentar Ustave art. 161, n. 38; NERAD, Komentar Ustave art. 161, n. 65.
894 Ruling U-I-70/2012 of 24 May 2012, nn. 2 ff., not published.
895 E.g. ruling U-I-196/2014 of 9 October 2014, n. 8, Uradni list 74/14 and 90/15.
896 Ruling U-I-76/2014 of 17 April 2014, n. 5, see above at fn. 799.
897 Out of many see ruling U-I-86/2013 of 25 April 2013, nn. 9 f., not published.
898 See ruling U-I-285/1994 of 22 December 1994, OdlUS IV, 30.

B. Legal effect of decisions

The significance of the legal effects of its decisions for the legal protection of petitioners is acknowledged by the Constitutional Court itself. In order to find the most efficient protection the Court developed a particular technique of decision-making, extending the types of decisions prescribed in art. 161 para. 1 Constitution and art. 43 ff. CCA. This activist and creative approach of the Court has found great attention in Slovene doctrine.[899] The new techniques of decision-making can be considered to allow an even more efficient protection of petitioners against legislative authorities in each individual case and according to concrete legal and actual circumstances.

a) Abrogation, annulment and declaratory decisions

The Constitutional Court can sanction inconsistencies with the Constitution or the legal order by invalidating acts of legislation. With a mere future legal effect (*ex nunc*) abrogations of unconstitutional provisions become effective on the day following their publication in the Official Gazette or in case of their suspended enforcement, the latest one year thereafter. This enables successful petitioners to anticipate the adoption of final decisions on the basis on these provisions. Annulments, on the other hand, which deprive final decisions and individual acts passed in application of a contested provision from their legal bases with a retrospective effect (*ex tunc*), can be ordered only if indispensable to remedy harmful consequences. Annulments consequently remain the exception in the Court's practice.[900]

Furthermore, the Constitutional Court is entitled to declare violations of the Constitution or the laws by binding decisions obliging the legislator to remedy inconsistencies within a predetermined period of time. Such declaratory judgments are passed with respect to legal provisions that ceased to be effective but still have negative consequences or in relation to legal gaps or legislative

899 For a detailed description of the technics see KRIVIC, Ustavno sodišče, 147 ff.; NERAD, Komentar Ustave art. 161, nn. 1 ff.; TESTEN, Tehnike ustavnosodnega odločanja, 213 ff.

900 E.g. decision U-I-288/2011 of 15 December 2011, n. 5, Uradni list 109/11; decision U-I-395/1996 of 3 April 1997, n. 7, Uradni list 23/97 and OdlUS VI, 45 (English translation available).

omissions.[901] Besides, declaratory decisions can be passed if decisions to abrogate or to annul legal provisions are impracticable or impossible.[902] The Court for example adopted declaratory decisions when it considered invalidations of provisions as detrimental to the comprehensibility of an act in its entirety,[903] for entailing even more harmful consequences for constitutional guarantees,[904] or for resulting in further discriminations.[905]

b) Interpretative decisions

As possibly most activist approach of the Constitutional Court in finding solutions for an efficient enforcement of the Constitution, it recognizes its competence to issue authoritative and binding interpretations.[906] Therewith, it entitled itself to specify the interpretation and application of legal provisions compliant with the Constitution and the laws.[907] The Constitutional Court justifies its interpretative power with the removal of inconsistencies and uncertainties in this respect[908] and with the argument *a maiore ad minus* invoking the considerably stronger encroachment of decisions to invalidate acts of legislation upon the legislative power.[909]

It is noteworthy that, although the interpretative competence is criticized for interfering with the legislative and the judicial authorities,[910] it meets with widespread approval.[911] Nevertheless, the Constitutional Court shows a restrained approach in interpreting legislative acts. With reference to the primary responsibility of the courts it explicitly refuses to give an «advisory opinion»

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901 E.g. decision U-I-134/2010 of 24 October 2013, n. 33, Uradni list 92/13; decision U-I-147/2012 of 29 May 2013, n. 30, Uradni list 52/13.

902 For more details see e.g. NERAD, Komentar Ustave art. 161, nn. 45 f.

903 Decision U-I-249/2010 of 15 March 2012, n. 33, Uradni list 27/12 and OdlUS XIX, 34.

904 E.g. decision U-I-67/2009 and Up-316/2009 of 24 March 2011, n. 20, Uradni list 28/11 and OdlUS XIX, 19 (English translation available).

905 Decision U-I-146/2012 of 17 December 2013, nn. 100 f., Uradni list 107/13 and OdlXX, 10 (English tralsation available).

906 A detailed study with respect to the constitutional foundations of the interpretative power is provided by KRISTAN, Razlagalne odločbe, 11 ff.

907 MAVČIČ, Zakon o ustavnem sodišču, 246 f.; NERAD, Komentar Ustave art. 161, n. 21.

908 See e.g. decision U-I-108/1991 of 13 July 1993, Uradni list 42/92 et al. and OdlUS II, 67 (English translation available).

909 E.g. TESTEN, Interpretacija u odlukama, 267 f.

910 E.g. GRAD, 7; MAVČIČ, Zakon o Ustavnem sodišču, 246 f.

911 KRISTAN, Razlagalne odločbe, 24 ff., 41; MAVČIČ, Slovenian constitutional review, 22 f.; TESTEN, Komentar Ustave art. 161, n. 32; NERAD, Komentar Ustave art. 161, nn. 21 ff.

on correct interpretations and predicates its competence on the exhaustion of all available remedies before the judiciary.[912]

c) Determination of authority and manner of implementation

As a particularity art. 40 para. 2 CCA empowers the Slovene Constitutional Court to determine the authority and the manner of implementation of its decisions. While considerably intensifying the protection of the constitutional order, this power is very controversial both among legal scholars and in politics.[913] A respective attempt at reform in 1998 failed due to broad resistance against a restriction of the Court's powers.[914]

A closer look at its jurisdiction reveals that the Constitutional Court determines the manner of implementation of its decisions if it considers such a measure as indispensable for the effective protection of constitutional rights. It frequently uses this competence to bridge periods of legal uncertainty after the invalidation of unconstitutional provisions to the adoption of a new regulation. These orders range from temporary measures to be taken,[915] the temporarily continued legal validity of abrogated provisions,[916] up to the temporary determination of concrete legal solutions.[917]

Noteworthy is the Court's practice of the so-called «intensification of sanctions» for repeated review with which the Court itself regulates the rights and duties of persons concerned, if the legislative authorities fail to implement its judgments.[918] Illustrative is its decisions in relation to the community «Ankaran». After the legislator failed to adhere to the Court's decision to enact nec-

912 See ruling U-I-96/2010 of 5 May 2010, n. 3, Uradni list 40/10.

913 KRIVIC, Ustavno sodišče, 157; MAVČIČ, Slovenian constitutional review, 77; TESTEN, Tehnike ustavnosodnega odločanja, 242.

914 See e.g. TESTEN, Tehnike ustavnosodnega odločanja, fn. 61.

915 E.g. decision U-I-60/2003 of 4 December 2003, n. 25, Uradni list 131/03 and OdlUS XII, 93 (English translation available).

916 Decision U-I-249/2010 of 15 March 2012, n. 34, Uradni list 27/12 and OdlUS XIX, 34.

917 E.g. decision U-I-94/2013 of 2 October 2014, n. 17, Uradni list 74/14; ruling U-I-67/2014 of 18 April 2013, n. 5, Uradni list 39/13, 17/14.

918 See NERAD, Komentar Ustave art. 161, n. 62; National Report of the Slovenian Constitutional Court prepared for the XV[th] Congress of the Conference of European Constitutional Courts in Bucharest, 6 f., 14 f. on <http://confeuconstco.org/reports/rep-xv/SLOVENIA%20eng.pdf> (last accessed September 2018).

essary regulations for the founding of the community of Ankaran, the Constitutional Court ordered the establishment of the community and the scheduling of a popular vote itself.[919]

The Court itself invokes the merely temporary and therefore limited impact of such decisions.[920] Yet, opinions remain divided. While certain scholars regard it as unnecessary additional power and excessive interference with the legislative power,[921] others consider it as efficient means to enforce the constitutional guarantees against the legislator.[922]

C. Reparation and compensation for violations suffered

Following the legal tradition under socialist rule, petitioners can achieve redress against violations suffered directly or indirectly by unconstitutional legislative acts. Based on art. 46 CCA

> «[a]ny person who suffers harmful consequences due to a regulation or general act issued for the exercise of public authority which has been annulled is entitled to request that such consequences be remedied.»

The authorities who adopted state acts that caused harmful consequences are responsible to remedy negative consequences. Depending on whether these arise directly based on an annulled provision or through its application by a concrete individual act, the law differentiates between two ways to achieve redress.

a) Request for reparation

Petitioners whose rights are violated by final individual acts and decisions can file requests for reconsideration on the basis of the decision of the Constitutional Court to annul the legal basis upon which they have been adopted. The

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919 Decision U-I-114/2011 of 9 June 2011, Uradni list 47/11 and OdlUS XIX, 23. See also decision U-I-114/1995 of 7 December 1995, Uradni list 8/96 and OdlUS IV, 120 (English translation available).

920 See e.g. decision U-I-80/2009 and Up-3871/2009 of 1 October 2009, n. 31, Uradni list 88/09 and OdlUS XVIII, 42 (English translation available).

921 See KRIVIC, Ustavno sodišče, 163 ff. See also CERAR, 382; GRAD, 7; TESTEN, Tehnike ustavnosodnega odločanja, 240 f.

922 E.g. NERAD, Komentar Ustave art. 161, nn. 2 and 59.

requests are addressed directly to the administrative or judicial authority responsible for passing the act in first instance.[923]

Based on art. 46 para. 3 CCA redress can also be sought from the legislative powers responsible for the enactment of a regulation that directly interferes with rights and liberties and which is annulled by the Constitutional Court.[924] Given that the Court has no power to annul formal laws adopted by the National Assembly, requests for redress can only be filed to other legislative authorities. While these are obliged to enact a new regulation which is consistent with the Constitution and the laws, the question arises in what form legislative authorities can offer redress for direct violations of individual rights? As possible answers, the Court considered the enactment of a new regulation ordering the indemnification in form of a *restitutio ad integrum*, or remedy in form of a payment of compensation.[925]

The right to request redress for violations suffered on the basis of annulled regulations is not restricted to successful petitioners who gave the impetus for the annulment. Rather, the legislator entitled any person harmed on the basis of such provisions to request reparation against responsible authorities. The entitlement is predicated on the substantiation that violations have occurred either directly on the basis of the annulled regulation or indirectly by an individual act passed in its application.[926]

Whether the requirements for the opening of proceedings are given is established independently from the findings of the Constitutional Court and in accordance with the pertinent procedural rules. The Administrative Court for instance accepted a complaint filed by a group of inhabitants, whose request for redress for negative consequences by the issuance of a building permit for apartment houses was rejected by the responsible building authority. The Court found that the inhabitants clearly substantiated the existence of harmful consequences and were therefore entitled to a redress by the building authority.[927]

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923 NERAD, Komentar Ustave art. 161, n. 28. See e.g. Supreme Court's decision no. X Ips 571/2006 of 11 September 2008 and decision no. X Ips 1226/2006 of 14 November 2007.

924 E.g. KRIVIC, Ustavno sodišče, 153.

925 See decision U-I-25/1994 of 2 June 1994, Uradni list 35/94 and OdlUS III, 61 (English translation available).

926 See e.g. ruling of the Supreme Court Up 183/2003 of 5 June 2003, no. 1.

927 Decision of the Supreme Court U-III-122/2010 of 19 May 2011.

Pursuant to art. 46 para. 2 CCA requests for reparation can be filed during three months from the day of publication of the Constitutional Court's decision to annul reviewed provisions, under the condition that the petition that triggered the annulment was filed within one year from the adoption of the respective individual act. These time limits are considered as means to «stimulate» persons concerned to file petitions.[928] However, their application onto cases where claims for redress are filed directly to legislative authorities must be considered as editorial mistake, given the absence of an individual act. The Constitutional Court itself refers to the analogous application of the objective term of one year for filing petitions against regulations with an immediate legal effect.[929] The application of the subjective term, which starts to run with the knowledge of the petitioner about harmful consequences, is seen as other possible solution.[930] As to a third view, finally, only the three months term starting with the annulment of the provision should be decisive for the admissibility of requests for redress.[931]

b) Subsidiary request for compensation for damage

If violations or negative consequences cannot be remedied anymore by means of redress against the responsible authority the persons concerned are entitled to file a subsidiary claim for compensation before the judiciary. For the lack of further concretization, it must be assumed that the impossibility to remedy negative consequences must be attributable to reasons for which applicants have no responsibility.[932]

c) Practicability

Considering the rigid interpretation of direct legal interest as admissibility requirement for petitions, the practical expediency of this means of redress becomes questionable.[933] By submitting valid constitutional complaints, petitioners who contest acts of legislation without immediate legal effect can improve their legal position by a mere invalidation of the contested provision. It is therefore unlikely that the Constitutional Court orders its annulment and therewith provides a legal basis for claims of redress. Given that formal laws

928 For details see NERAD, Komentar Ustave art. 161, nn. 28 f.
929 See ruling U-I-184/1999 of 24 October 2002, nn. 9 f., OdlUS XI, 223.
930 NERAD, Komentar Ustave art. 161, n. 31.
931 See to that effect MAVČIČ, Zakon o Ustavnem sodišču, 261.
932 See NERAD, Komentar Ustave art. 161, nn. 32 f. with references to pertinent decisions.
933 In detail also NERAD, Komentar Ustave art. 161, nn. 29 f.

cannot be annulled requests for redress can, furthermore, neither be filed to legislative authorities responsible for the enactment of formal laws with an immediate legal effect on the rights and obligations of individuals. The practical applicability of the right to reparation is thus only conceivable in relation to regulations and other sub-legislative acts which directly violate the rights and freedoms and entail immediate negative consequences for the applicants.

III. Initiative for judicial review in Macedonia

1. Introductory remarks

As has been shown the Macedonian Constitution contains only very few provisions on constitutional adjudication. While art. 50 provides a general guarantee of individual access to the Constitutional Court for the protection of constitutional rights and liberties, neither the Constitution nor any law list the applicants authorized to request the initiation of proceedings. Instead, the Constitutional Court regulated its accessibility at its own discretion. In art. 12 RoP, it accordingly determined that

> «[a]nyone can submit a petition for initiating proceedings on the assessment of the constitutionality of law or the constitutionality and legality of a regulation or other common act.»

The Macedonian term *inicijativa* can be translated as «initiative» or «petition». Even though this designation indicates a non-committal nature, the binding effect of this popular complaint is controversial also in Macedonia. As to art. 11 RoP review proceedings are initiated only upon formal rulings of the Constitutional Court. Some scholars therefore reject a binding effect of initiatives.[934] Yet, and in reference to what has been said with regard to the popular complaints in Croatia and Slovenia, the formalized procedure prescribed for the assessment of the admissibility of initiatives is indicative of a committal effect. Art. 78 RoP obliges the Macedonian Constitutional Court to assess the admissibility of every submittal and to deliver rulings on their acceptance or rejection to the petitioners. Another indication for a binding effect

934 E.g. TRAJKOVSKA-HRISTOVSKA, Access to Constitutional Justice, 11 f.; ČOBANOV, 143, 184, 201.

is the absence of a procedural distinction between initiatives filed by individuals and such submitted by state organs.

The analysis of the pertinent literature and practice reveals a widespread view considering the right of initiative as *actio popularis*. This opinion can be found in foreign doctrine,[935] and among domestic scholars[936] and is shared by the Constitutional Court itself.[937] Eventually, even those denying a binding nature admit that the initiative must at least be recognized as *de facto actio popularis*.[938]

2. Admissibility requirements

In the absence of respective legal provisions the Constitutional Court by its regulatory autonomy regulated the admissibility requirements and the proceedings in which they are ascertained itself. In a first step, the Court Secretary filters out manifestly inadmissible initiatives which do not comply with the formal requirements.[939] The assessment of the admissibility of initiatives is conducted in preliminary proceedings, regulated by art. 17 ff. RoP. On this occasion corresponding initiatives are merged to one and the same submission according to art. 21 RoP.

The analysis of the case-law reveals that the Constitutional Court only initiates review proceedings upon the existence of reasonable doubts about the constitutionality or lawfulness of contested provisions. To this end, also the Macedonian Court assesses the content and allegations of initiatives already in the preliminary proceedings. If it does not consider them to put into doubt the compliance of a contested provision with the Constitution and the laws it rules that the allegations are unfounded.

935 BRUNNER, Zugang des Einzelnen, 230; HARUTYUNYAN/NUSSBERGER/PACZOLAY, n. 74.

936 E.g. SHASIVARI, 58.

937 See National Report of the Macedonian Constitutional Court prepared for the XVth Congress of the Conference of European Constitutional Courts, 4. The Report is retrievable over <http://www.confeuconstco.org/reports/rep-xv/MACEDONIA%20eng.pdf> (last accessed September 2018).

938 ČOBANOV, 202, 204 f.; TRAJKOVSKA-HRISTOVSKA, Access to Constitutional Justice, 11 f.

939 For a detaild analysis of the preparatory proceedings see ČOBANOV, 190.

A. Jurisdiction of the Constitutional Court

In accordance to its counterparts in Croatia and Slovenia also the Macedonian Constitutional Court assesses in the first place whether or not it is competent to review contested state acts. Pursuant to art. 110 indents 1 and 2 Constitution

> «[t]he Court decides on the conformity of laws with the Constitution [and] on the conformity of collective agreements and other regulations with the Constitution and the laws.» (*Insertion added*)

As a consequence of this general wording and the absence of legal concretizations the Court is granted wide discretion in interpreting this constitutional provision. In its twenty-five years of activity it developed a comprehensive practice with respect to the benchmarks and the acts of legislation subject to its review power.

a) Benchmarks for judicial review

The Constitution constitutes the primary benchmark for judicial review.[940] The body of constitutional law also encompasses other acts enacted in proceedings prescribed for constitution-making. Besides constitutional amendments this comprises constitutional acts enacted for the implementation of the Constitution.

Formal laws which are enacted by the National Assembly in legislative proceedings or adopted by referendum constitute benchmarks for the review of regulations and other acts of a sub-legislative nature. A qualified two-thirds majority is required for the adoption of «systemic laws» such as the Civil Procedures Act,[941] the laws regulating the organization and work of administrative state bodies and the judiciary and the law on local self-government.[942] Despite the different quorums for adoption, neither the case-law of the Constitutional Court nor the constitutional provisions indicate a superior hierarchical rank of systemic laws to formal laws.

Based on art. 118 the Constitution, which determines ratified international treaties as part of the domestic legal order and art. 8 para. 1 indent 11, which

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940 In the beginning, the Court clarified at several instances that the Constitution of 1991, and not its predecessor of 1974, constituted the benchmark for judicial review. See e.g. ruling U.br.164/1994 of 14 October 1994, n. 3.

941 See for instance ruling U.br.91/2012 of 6 March 2013, n. 6.

942 Art. 74, 95 para. 3, 98 para. 4 and 114 para. 5 Cst. Macedonia.

lists generally accepted norms of international law as fundamental principles of Macedonian constitutional law, international law is generally recognized as benchmark for the legislative authorities.[943] Nevertheless, the Constitutional Court refuses to review domestic laws with respect to their compatibility with international law for the lack of an explicit reference to international law as standard for judicial review the Constitution.[944] Consequently, it rejects a considerable number of initiatives requesting the review of contested provisions with regard to their compliance with international human rights standards.[945] The same applies to the ECHR, which Macedonia ratified in 1997 and to its protocols.[946] Instead, the Constitutional Court refers to international guarantees, comprising the European *acquis communautaire*, the ECHR and international human rights charters as standards for interpretation of the constitutionally guaranteed rights and liberties.[947]

b) Objects of judicial review

aa) Constitutional law

By referring to the political will of people the Constitutional Court refuses to review the Constitution and other constitutional acts with respect to their content.[948] At the same time, there are no indications that it acknowledges its power to review the formal constitutionality of constitutional acts, namely the compliance of their enactment or changes with the proceedings prescribed for constitutional amendments. This question, i.e. whether constitutional law also comprises provisions with a supra-constitutional value, is controversial in

943 KLIMOVSKI/DESKOSKA/KARAKAMIŠEVA, 577; SPIROVSKI, passim; TRENESKA-DESKOSKA, Constitutional Court, 15 f.

944 National Report of the Macedonian Constitutional Court prepared for the XIVth Congress of the Conference of European Constitutional Courts, 17 f. The Report is retrievable over <http://www.confeuconstco.org/reports/rep-xiv/report_Macedonia_en.pdf> (last accessed September 20188).

945 See e.g. rulings U.br.52/2011 and U.br.76/2011 of 25 January 2012, n. 12. See also two rulings by which the Court rejected initiatives of asylum seekers against the Asylum Act: U.br.159/2004 of 19 January 2005 (English translation available) and ruling U.br.2/2004 of 16 February 2005 (English translation available).

946 E.g. ruling U.br.137/2013 of 8 October 2014, n. 5; ruling U.br.25/2013 of 25 September 2013, n. 6. For more details in this respect see SPIROVSKI, 9 ff.

947 E.g. SPIROVSKI, 4 f.; Illustrative are e.g. decision U.br.107/2010 of 16 February 2011, n. 4 (English translation available); decision U.br.139/2010 of 15 December 2010, n. 6 (English translation available).

948 E.g. ruling U.br.188/2001 of 24 October 2001, n. 3.

Macedonian doctrine.[949] The Constitutional Court's refusal to review the mutual compatibility of two constitutional provisions however indicates that it does not recognize the existence of such supra-constitutional norms.[950]

bb) International treaties

Considering decisions to ratify international treaties as political, the Constitutional Court initially refused to review both the constitutionality of international treaties and of laws of ratification.[951] After accepting to review the law ratifying the bilateral agreement with the Greek Republic,[952] the Constitutional Court returned to its initial position only a few years later. By reference to the political significance, it rejected a number of initiatives that contested agreements with the EU in view of a future accession of Macedonia.[953]

At this point it must be noted that the Constitutional Court's position is valued differently. Only a minority approves of its rejection to review laws of ratification based on the supreme normative position of international treaties in the domestic legal order.[954] A majority of scholars advocates for such a competence, not only as a necessity to detect and to eliminate treaties which are inconsistent with the constitutional order, but also as a logical consequence of their inclusion into the domestic legal system.[955] A third opinion calls for the adoption of constitutional changes to explicitly empower the Court to review ratified international treaties with respect to their compliance with the Constitution.[956]

cc) Formal laws

Also the Macedonian Constitutional Court is requested by the majority of initiatives to review formal laws which are adopted by referendum or by the National Assembly in proceedings prescribed for legislation. With regard to

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949 For more details see MUKOSKA-ČINGO, 234 ff.

950 E.g. ruling U.br.222/1995 of 28 June 1995, n. 3.

951 With respect to the Framework Agreement of Ohrid signed on 13 August 2001 to overcome the ethnic conflict with the Albanian minority see ruling U.br.190/2001 of 31 October 2001, n. 4.

952 Decision U.br.140/2001 of 4 December 2002, n. 6.

953 Ruling U.br.213/2005 of 12 April 2006, n. 4; ruling U.br.5/2005 of 16 November 2005, n. 4. See SKARIĆ, 700; SPIROVSKI, 3.

954 E.g. SKARIĆ, 694.

955 See to this effect ČOBANOV, 207; MUKOSKA-ČINGO, 248.

956 KRAČINSKI, 483 ff.; TRAJKOVSKA-HRISTOVSKA, Access to Constitutional Justice, 11 f.

so-called authentic interpretations of legal provisions the Constitutional Court adopts a restrained approach. Considering them as integral components of legislation and as exclusive authority of the legislator, it refuses to review their compliance with the Constitution.[957] At the same time it emphasizes that it would review such interpretations with respect to possible violations of the procedural rules for legislating, if it established a transgression of the substantial content of a legal provision.[958]

An exceptional power to enact decrees with the force of law during states of war or emergency is conceded to the Government by art. 126 Constitution. To the knowledge of the author the Constitutional Court has not yet had the opportunity to express itself on its competence to review the constitutionality of emergency decrees. Their qualification as formal laws in doctrine could however be indicative in this respect.[959]

dd) Collective agreements and other regulations

The Constitutional Court defines collective agreements by reference to the legislation on labour relations.[960] In contrast to the comprehensive scope of collective agreements reviewed under socialist rule, it only reviews collective agreements concluded in the public sector.[961] Requiring that agreements regulate working relations with a generally binding and normative effect for all employees, it refuses to review agreements on concrete legal relations or questions between contracting parties.[962] In practice, collective agreements are frequently contested for violating the minimum standards of employee rights prescribed by the Labour Relations Act.[963]

In the Court's words, regulations

957 Ruling U.br.49/2013 of 10 July 2013, n. 5; ruling U.br.87/2012 of 3 October 2012, n. 4.
958 See to that effect ruling U.br.158/2011 of 31 October 2012, n. 7.
959 See e.g. KLIMOVSKI/DESKOSKA/KARAKAMIŠEVA, 506 f.; SKARIĆ, 694 f.
960 Art. 206 Labour Relations Act of 27 December 1993, Služben vesnik 80/93-2007.
961 For more details in this regard see ČOBANOV, 404 ff.
962 E.g. ruling U.br.211/2011 of 15 February 2012, n. 3; ruling U.br.142/2004 of 8 December 2004, n. 4.
963 See for many decision U.br.73/2014 of 8 October 2014, n. 6; ruling U.br.34/2012 of 11 September 2013, n. 6; decision U.br.214/2011 of 4 April 2012, n. 5.

> «contain general rules of behaviour, regulate legal relations and establish general rights and obligations of an indeterminable circle of legal subjects.»[964]

This definition comprises a broad scope of acts, including all decisions and general acts but formal laws adopted by the National Assembly and acts of a general nature and decrees for the enforcement of laws adopted by the governmental and the executive bodies.[965] In practice however, the Court rejects numerous initiatives to review governmental decisions which regulate concrete legal questions and relations or that have a mere internal legal effect for administrative institutions.[966] As regulations the Court also reviews general normative acts adopted by bodies of local self-government.[967] Furthermore, the Constitutional Court reviews general acts issued by public institutions or enterprises authorized by law to adopt regulations within their field of activity.

The broad scope of acts considered as regulations even comprises general acts adopted by non-governmental organizations with an external and normative effect. The Court accordingly reviewed a decision of the Lawyers Association of the Republic of Macedonia on tariffs for rewards and compensation for the work of attorneys at law and general acts enacted by pensioners' associations.[968]

The analysis reveals that the Constitutional Court at several instances refused to review acts that evidently fulfil the criteria established for regulations. Particularly noteworthy in this respect is its principle refusal to review parliamentary decisions in relation to elections or public votes. The Court for instance rejected initiatives filed against decisions of the National Assembly to schedule presidential and parliamentary elections, considering them to lack a general nature.[969] Based on similar grounds it refused to review a decision by which the Assembly rejected a referendum request submitted by over 200,000

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964 Ruling U.br.104/2013 of 26 November 2013, n. 4; ruling U.br.47/2013 of 9 May 2013, n. 4; ruling U.br.190/2012 of 19 December 2012, n. 4.

965 E.g. ruling U.br.168/2011 of 6 February 2013, n. 4; decision U.br.224/2011 of 14 November 2012, n. 6.

966 Out of many see ruling U.br.38/2015 of 21 October 2015, n. 4; ruling U.br.44/2013 of 25 February 2015, n. 4; ruling U.br.132/2014 of 17 December 2014, n. 4.

967 See e.g. ruling U.br.40/2013 of 24 April 2013, n. 4.

968 Decision U.br.171/2011 of 11 April 2012, n. 6; ruling U.br.224/2001 of 27 March 2002, n. 5.

969 Ruling U.br.156/1994 of 28 September 1994, n. 4. It repeated this standpoint in ruling U.br.86/2006 of 10 May 2006, n. 5.

citizens on the holding of early parliamentary elections.[970] Among legal scholars these rulings are strongly criticized for the weakness of argumentation and for the far-reaching encroachment upon the democratic rights of citizens and democratic rule.[971] Not least because of these decisions, the Macedonian Constitutional Court faces blames for the misuse of its wide discretion and for the political implication of its rulings indicating close ties with the governing majority.[972]

ee) Urban and spatial plans

Urban and spatial plans of the state and on the communal level are of a considerable relevance in the practice of the Macedonian Constitutional Court. In art. 8 indent 10 the Constitution awards a fundamental constitutional value and role to a proper urban and rural planning for the promotion of human environment, ecological protection and development. While the Law on Spatial and Urban Planning entitles the Assembly and the communities to enact spatial and urban plans,[973] the Constitutional Court acknowledges such acts as regulations because they regulate the use of land in a general and abstract manner.[974]

Yet, it only accepts to review their formal compliance with the Constitution and the laws.[975] Only if planning acts are contested for not having been enacted or amended in accordance to the pertinent procedural rules does the Court acknowledges their compatibleness with human environment and ecological development to be refuted. It accordingly reviews and annuls urban and spatial plans that have been passed by the responsible organs without including citizens concerned or without consultation of experts or special authorities for the protection of respective natural resources.[976] On the other hand, the Constitu-

970 Ruling U.br.150/1996 of 11 December 1996, n. 6. See also ruling U.br.167/2004 of 20 October 2004, n. 4.

971 Čobanov, 225. See with details also Mukoska-Čingo, 274 ff.; Skarić, 708 f.

972 See Čobanov, 224 f.; Krčinski, 480. Detailed in Mukoska-Čingo, 449 ff.; Treneska-Deskoska, Constitutional Court, 14.

973 Art. 22 Law on Spatial and Urban Planning of 16 June 2008, Služben vesnik 53/11.

974 See e.g. ruling U.br.104/2013 of 26 November 2013, n. 4.

975 E.g. ruling U.br.171/2014 of 24 June 2015, n. 4; ruling U.br.73/2013 of 9 July 2014, n. 5.

976 See for many decision U.br.3/2013 of 25 November 2014, n. 7; decision U.br.192/2004 of 2 March 2005, n. 6 (English translation available).

tional Court for instance rejects numerous initiatives against planned constructions or for an insufficient amount of parking spaces for being filed out of mere dissatisfaction.[977]

ff) Lack of review competence

In contrast to its Croatian and Slovenian counterparts, the Macedonian Constitutional Court refuses to review legal provisions that are not legally valid. By invoking the lack of a respective competence and the absence of grounds to review acts that are not part of the legal order anymore, it also refuses to review provisions that ceased to be effective.[978] The same applies to legal drafts and published laws or regulations which have not yet entered into legal force.[979]

The Constitutional Court moreover refuses to review laws or regulations with respect to legislative omissions and legal gaps.[980] It accordingly rejects numerous initiatives contesting laws or regulations for not regulating a certain issue, either by referral to the lack of jurisdiction[981] or for the existence of a procedural hurdle.[982] Although it accepts its competence in as far as legal gaps are inconsistent with constitutional rights and liberties,[983] it rejected an initiative against a provision of the Family Act for restricting the recognition of close relationships to relations between different sexes, while excluding same-sex couples.[984]

As its counterparts in Croatia and Slovenia the Macedonian Court refuses to review the mutual compatibility of acts and provisions of the same hierar-

977 E.g. ruling U.br.17/2013 of 11 September 2013, n. 4; ruling U.br.139/2012 of 26 December 2012, n. 4.

978 See e.g. ruling U.br.59/2013 of 18 March 2015, n. 4; ruling U.br.68/2014 of 5 November 2014, n. 4. For a detailed analysis of the practice see ČOBANOV, 255 ff., 342.

979 ČOBANOV, 188.

980 National Report of the Republic of Macedonian Constitutional Court for the XIVth Congress of the Conference of European Constitutional Courts, above at fn. 944, 13 f.

981 E.g. ruling U.br.79/2015 of 9 December 2015, n. 6.

982 E.g. ruling U.br.57/2015 of 18 November 2015, n. 5.

983 E.g. decision U.br.49/2006 of 13 December 2006, n. 5; decision U.br.172/2005 of 24 May 2006, n. 5.

984 Ruling U.br.71/2012 of 28 November 2012, n. 4.

chical level. Consequently, it frequently rejects initiatives to review the compliance between laws or regulations,[985] and to assess internal inconsistencies within acts of legislation.[986]

Furthermore, it shows reluctance to encroach upon the competences of the other state powers and upon the legislative function in particular. Just as the Croatian and Slovenian Courts, the Constitutional Court refuses to review the expediency or justification of acts of legislation, considering such questions as political and reserved to the legislative authorities. At the same time, it acknowledges a wide political discretion in certain fields of economic and social life in accordance to given economic circumstances and social needs as well. In particular, it recognizes a wide political discretion in regulating financial and economic relations,[987] in relation to social policy and the definition of social rights,[988] with respect to the political and judicial system,[989] and in several other political fields comprising energy or educational policy.[990] Only if the legislative authorities exceed their discretionary power does the Constitutional Court acknowledge its competence to review and to abrogate respective provisions for violating the Constitution.[991]

In delimiting its powers from the judiciary the Constitutional Court finally refuses to review the application or implementation of contested laws or regulations in judicial review proceedings,[992] or to interpret legal provisions in order to ensure their uniform application and execution.[993]

985 E.g. ruling U-I-94/2014 of 21 January 2015, n. 4; ruling U.br.128/2013 of 17 December 2014, n. 4.

986 E.g. ruling U.br.143/2011 of 7 November 2012, n. 7; ruling U.br.160/2011 of 8 February 2012, n. 6.

987 Ruling U.br.107/2012 of 28 November 2012, n. 4; ruling U.br.103/2000 of 15 November 2000, n. 5.

988 E.g. ruling U.br.38/2012 of 13 June 2012, n. 4.

989 Out of many see ruling U.br.162/2014 of 18 March 2015, n. 4; ruling U.br.91/2014 of 17 December 2014, n. 4; ruling U.br.66/2012 of 26 June 2013, n. 5.

990 E.g. ruling U.br.140/2013 of 3 June 2015, n. 4; ruling U.br.161/2012 of 23 January 2013, n. 4; ruling U.br.188/2012 of 9 January 2013, n. 4.

991 E.g. decision U.br.199/2008 of 18 March 2009, n. 5 (English translation available).

992 See e.g. ruling U.br.55/2015 of 24 June 2015, n. 4; ruling U.br.35/2014 of 21 January 2015; ruling U.br.102/2014 of 19 November 2014, n. 4.

993 E.g. ruling U.br.94/2012 of 12 September 2012, n. 4. For more details with respect to interpretations of laws see e.g. SHASIVARI, 56.

B. No requirement of a legitimate interest

With art. 12 RoP the Constitutional Court introduced the accessibility of judicial review proceedings to every individual and legal subject.

There are no constitutional or legal provisions predicating the entitlement to file initiatives on the demonstration of a legal interest. The analysis of the pertinent case-law reveals that neither the Court introduced a respective admissibility requirement through interpretation. Applicants must therefore neither demonstrate a personal concern nor substantiate a direct interference of contested provisions with their rights or legal position.

Just as its Croatian counterpart also the Macedonian Constitutional Court is accessible to an unrestricted circle of applicants. By far the most initiatives in practice are submitted by individuals. Besides, numerous initiatives are submitted by citizen associations and other informal groups such as groups of inhabitants of a community or a group of employees in a detention centre,[994] by economic enterprises and associations of economic interest,[995] by social organizations such as pensioner associations, trade unions, consumer organizations, sport clubs,[996] or religious associations,[997] and by political parties.[998] Frequently, initiatives are also filed by non-governmental organizations[999] and by members of minority groups.[1000]

For lack of a specific authorization of state organs or other public bodies as qualified applicants, finally also the state authorities comprising the legislative, executive and judicial branch and other public bodies are entitled to request the initiation of judicial review proceedings against laws and other acts of legislation on the basis of art. 12 RoP.

994 E.g. ruling U.br.179/2012 of 4 June 2013; ruling U.br.146/2011 of 22 February 2012.
995 E.g. ruling U.br.50/2013 of 19 February 2014; ruling U.br.65/2013 of 6 November 2013.
996 E.g. ruling U.br.84/2014 of 10 December 2014; ruling U.br.197/2012 of 11 September 2013; decision U.br.200/2008 of 13 May 2009 (English translation available).
997 Ruling U.br.24/2012 of 20 November 2012.
998 E.g. ruling U.br.61/2011 of 18 May 2011; decision U.br.133/2005 of 6 June 2007 (English translations available).
999 E.g. ruling U.br.92/2013 of 8 October 2014; ruling U.br.71/2012 of 28 November 2012.
1000 Decision U.br.84/2009 of 10 February 2010 (English translation available).

C. Requirements of form and substance

a) Form and content of initiatives

The Constitutional Court itself emphasizes that initiatives must be filed in compliance with the requirements prescribed by art. 15 f. RoP regarding form, content and quality.[1001] In contrast to its counterparts it did not publish any template for initiatives on its website. Initiatives must be submitted in written form and in two copies. In accordance with art. 7 Constitution, they can be filed in the official Macedonian language and Cyrillic script, or in a minority language spoken by at least 20 percent of the population of a respective local community. Applicants must indicate their name and title while anonymously filed initiatives are considered as not submitted. The initiatives must clearly indicate the legal provisions alleged to be unconstitutional or unlawful and name the constitutional or legal provisions deemed to be violated.[1002]

The analysis of its practice reveals that the Constitutional Court only accepts initiatives for consideration if the allegations raise reasonable doubts about the compliance of contested provisions with the Constitution and the laws. Applicants must consequently provide sufficient and suitable arguments that put into question the legitimacy of these acts.[1003] Mere referrals to a detrimental effect for their rights[1004] or personal dissatisfactions with legal rules do not suffice to raise reasonable doubts.[1005] In consistent practice the Constitutional Court rejects imprecise or ambiguous initiatives by referring to the existence of a procedural obstacle.[1006]

b) Improvement of insufficient and unclear initiatives

Based on art. 16 para. 1 RoP the Constitutional Court can invite applicants to correct and supplement insufficient or incomplete initiatives. If the Secretary of the Court establishes formal defects, it will return the initiatives and determine a term shorter than thirty days for the necessary corrections and supplements. As a result of the failure to comply with the time limit or to conduct

1001 Constitutional Court of the Republic of Macedonia, 22 f.

1002 See ruling U.br.30/2015 of 13 May 2015, n. 7; ruling U.br.3/2014 of 10 December 2014, n. 6.

1003 E.g. ruling U.br.127/2014 of 3 June 2015, n. 5; ruling U.br.179/2012 of 4 June 2013, n. 4. Similarly also ruling U.br.1/2008 of 17 September 2008, n. 4.

1004 Ruling U.br.47/2012 of 26 September 2012, n. 4.

1005 Ruling U.br.38/2012 of 13 June 2012, n. 4.

1006 E.g. ruling U.br.161/2013 of 5 March 2014, n. 4.

the requested corrections and changes the initiative is considered not to have been filed.

D. No temporal restrictions

In accordance with the unrestricted nature of *actio popularis*, the right to submit initiatives is not limited in time. Accordingly, initiatives can be filed at any time against laws and regulations that are valid and in legal force.

E. Cost burden

Just as in Croatia and Slovenia the proceedings before the Macedonian Constitutional Court are free of charge. The admissibility of initiatives does not depend on the payment of court fees nor does their submittal imply an additional cost burden by attorneys' fees as consequence of a required mandatory legal representation.

Pursuant to art. 46 para. 1 RoP applicants bear their own costs and expenses arising from the submittal of initiatives or from their participation in the review proceedings. Finally, there are no legal bases empowering the Constitutional Court to sanction abusive initiatives or to order penalty fees for negligent legal representatives who fail to comply with the prescribed formal requirements when submitting initiatives.

F. Procedural obstacles

a) Principle of res iudicata

In art. 112 para. 3 the Constitution prescribes the finality of decisions of the Constitutional Court. The generally binding nature applies to the state organs, to all legal subjects and to the Constitutional Court itself. It is prevented from reassessing already reviewed acts of legislation and to decide anew on their compliance with the Constitution and the laws.[1007] The Court therefore rejects initiatives which contest legal provisions for inconsistencies with the Constitution or the laws that have been dismissed as unfounded in earlier decisions.[1008]

1007 E.g. SKARIĆ, 705.

1008 See e.g. ruling U.br.78/2015 of 14 October 2015, n. 4; ruling U.br.128/2014 of 12 November 2014, n. 4.

Yet, just as the Constitutional Courts of Croatia and Slovenia, also the Macedonian Court acknowledges that the correctness of earlier decisions and rulings can be put into doubt if an alleged unconstitutionality or unlawfulness is substantiated by new arguments or statements or because of changed legal or factual circumstances. In practice however, it rejects numerous initiatives for the failure to provide new reasons that would justify a change of position,[1009] or for the failure to put into question the correctness of its earlier decisions.[1010]

b) Withdrawal or lapse of procedural requirements

As to art. 47 indents 1 and 2 RoP the withdrawal of initiatives or the fact that contested provisions cease to be effective lead to the closure of the review proceedings. In such cases the Constitutional Court invokes that there is no ground to assess contested acts of legislation anymore. The loss of legal validity of contested provisions constitutes a frequent reason for the closure of proceedings in practice.[1011]

Yet, the Rules entitle the Constitutional Court to proceed with the proceedings under certain conditions. On the basis of art. 43 RoP it can continue even after the withdrawal of initiatives, if it acknowledges a «wider constitutional importance» of the question at stake. Similarly art. 47 indent 1 RoP allows it to continue with the review proceedings also if contested provisions lose their legal validity if

> «there exists [a] basis for the assessment of their constitutionality or legality during the period in which they were in force.» (*Insertion added*)

Therewith, the Constitutional Court left it at its own discretion to decide in every individual case whether or not to close the review proceedings in case of the lapse of procedural requirements.

Finally, art. 47 indents 3 – 5 list further reasons for the closure of review proceedings before the adoption of a final decision. Accordingly, the Court can do so if it establishes that its decision to initiate proceedings was based on an improper assessment of facts or if its doubts about the compliance of contested

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1009 Out of many see ruling U.br.140/2014 of 18 February 2015, n. 6; ruling U.br.30/2013 of 10 July 2013, n. 5; ruling U.br.33/2013 of 24 April 2013, n. 6.

1010 E.g. ruling U.br.45/2013 of 25 December 2013, n. 6; ruling U.br.197/2012 of 11 September 2013, n. 4.

1011 E.g. ruling U.br.105/2012 of 8 October 2014, n. 4; ruling U.br.15/2014 of 2 April 2014, n. 4; ruling U.br.121/2012 of 11 September 2013, n. 4.

provisions with the Constitution or the laws are removed, e.g. after holding public hearings. It for instance closed review proceedings after the responsible authority submitted evidence about an announcement for public consultation on the draft of a contested urban plan which allayed the Court's doubts on the compliance of the adoption with the procedural rules for enactment.[1012]

c) Other procedural hurdles

Finally, the open wording of art. 28 indent 3 RoP, which allows the rejection of initiatives «if there are other procedural obstacles to deciding», leaves a very wide discretion to the Constitutional Court.[1013] The pertinent jurisdiction reveals that this provision serves as a kind of *reservoir* for the rejections of initiatives for a varied number of reasons. For the existence of a procedural hurdle it for instance rejects initiatives for having been filed against better knowledge of the applicant.[1014]

The Court moreover refers to the existence of a procedural obstacle if it is requested to review its own Rules of Procedures. It rejects respective initiatives by stating that it cannot review these Rules while being their creator.[1015] By invoking the existence of a procedural hurdle it moreover rejects initiatives against its regulatory autonomy in determining its organization and proceedings.[1016] These decisions are illustrative for the institutional problematic of the Constitutional Court's regulatory power: its Rules of Procedure are completely excluded from any review with respect to their compliance with the Constitution.

G. Examination of the merits

As has been shown, the Constitutional Court principally initiates review proceedings upon the existence of reasonable doubts about the constitutionality or lawfulness of contested provisions. To this end and just like the Courts of

1012 Ruling U.br.58/2011 of 11 January 2012, n. 4.

1013 ČOBANOV, 187.

1014 In ruling U.br.129/2013 of 26 February 2014, n. 4,. See also ruling U.br.115/2013 of 25 September 2013, n. 5; ruling U.br.135/2012 of 29 May 2013, n. 4.

1015 See ruling U.br.131/1997 of 17 September 1997, n. 4; ruling U.br.215/1993 of 8 February 1995, n. 4.

1016 Ruling U.br.77/2014 of 9 July 2014, n. 4; ruling U.br.252/1995 of 13 September 1995, n. 5.

Croatia and Slovenia also the Macedonian Court assesses the content and allegations of initiatives already in the preliminary proceedings. If it does not consider these to put into doubt the compliance of a contested provision with the Constitution and the laws it rules that the allegations are unfounded. Its rulings to not initiate review proceedings consequently entail a final legal force with respect to the claimed normative inconsistency.[1017] The same applies to rulings on the acceptance of initiatives for consideration with which the Court in principle anticipates its final decision on the unconstitutionality or unlawfulness of contested laws and regulations.

3. Status of petitioners in review proceedings

Despite the principally objective and non-adversarial nature of judicial review proceedings, also the Macedonian Constitutional Court introduced procedural elements that improve the procedural status of the petitioners.

A. Participatory rights of petitioners

a) Applicability of Convention standards for fair proceedings

In principle the ECtHR considers the standards for fair trial as guaranteed in art. 6 para. 1 ECHR applicable to proceedings before the Macedonian Constitutional Court, under the condition that these proceedings are relevant for the applicants civil rights and obligations or their criminal responsibility.

Illustrative is its decision *Mickovski vs. Macedonia*. The ECtHR did not consider as applicable the right to access to court, even though the Constitutional Court rejected the constitutional complaint of the applicant for late submittal, after he had unsuccessfully tried to submit his complaint to the Court during the summer period.[1018] It decided accordingly, because the issue at stake, namely the discharge of the applicant from his office as public servant, did not concern his civil rights and obligations.

1017 See hereto Constitutional Court of the Republic of Macedonia, 20. See also explanation b. of the Constitutional Court to the *types of legal effect of decisions* published on its website <http://ustavensud.mk/?page_id=5207&lang=en> (last accessed September 2018).

1018 Decision of 10 November 2005 as to the admissibility of application, *Mickovski vs. Macedonia*, 68329/01 (dec.).

Illustrative for the ECtHR's position on the applicability of the standards for fair trial to judicial review proceedings before the Macedonian Constitutional Court is its decision *Trajkoski and others vs. Macedonia*.[1019] The complainants alleged that with its politically motivated ruling, by which it rejected their initiatives against the communal urban plan, the Constitutional Court violated their right to an independent and impartial court. The ECtHR rejected the application as inadmissible on the grounds that these proceedings were not decisive for the civil rights and obligations of the complainants.

b) Participatory rights of petitioners

With its regulatory autonomy the Macedonian Constitutional Court introduced particular procedural means to improve the procedural status of petitioners in judicial review proceedings. Just as in Croatia and Slovenia these include a number of rights to *information* and to *participation*, allowing petitioners to exert influence on the decision-making of the Court.

Rights to information of the petitioners principally include their information about the status of their submittals and of the outcome of the proceedings. For the entire duration of the proceedings, petitioners are entitled to inspect the documentation and information relevant for the Court's decision on the basis of art. 22 RoP. Their information is finally guaranteed by the obligation of the Constitutional Court to publish and to deliver its decisions to the applicants pursuant to art. 78 RoP.

Possibilities of participation are provided at all stages of proceedings. So as to explain their allegations petitioners can be invited to consultative interviews already during the preliminary proceedings pursuant to art. 18 para. 4 RoP. If necessary to clarify the factual and legal status the Constitutional Court can invite petitioners on the basis of art. 29 RoP to so-called preparatory meetings at each stage of the proceedings. It can moreover decide to schedule public hearings as to art. 33 ff. RoP and therewith allow petitioners to explain and justify their allegations or to present their opinions on positions.[1020]

However, the decision to allow the participation of petitioners is left to the discretion of the Constitutional Court.[1021] In accordance with the constitu-

1019 Decision of 1 December 2005 as to the admissibility of application, *Trajkoski and others vs. Macedonia*, 13191/02 (dec.).

1020 ČOBANOV, 193 f.

1021 ČOBANOV, 195 f.

tional proceedings in Croatia and Slovenia petitioners cannot claim to participate in the review proceedings that were initiated upon their petition. Nevertheless, the Macedonian Court is – just as its counterparts – obliged to allow participation if the criteria for application of the Convention standards for fair trial are fulfilled. In practice the scheduling of public proceedings is not only common to constitutional complaint proceedings,[1022] but is ordered in the majority of judicial review proceedings as well.[1023]

B. Temporal limitations of proceedings

Art. 18 para. 3 RoP obliges the Constitutional Court to initiate the preceding procedure within ten days from the receipt of initiatives. For initiatives relating to the protection of human rights and liberties this term is shortened to three days. Another temporal limitation is provided for the duration of the preceding proceedings. Within three months from the receipt of a case the judge, who is responsible for the case, is obliged based on art. 23 para. 1 RoP to refer to the plenum of the Constitutional Court either by submitting a report on his or her findings or by informing the Court about the course of the proceedings. This term is shortened to thirty days if petitioners seek protection of human rights and liberties.

On the one hand, these acceleration measures serve the procedural economy and prevent an ever growing backlog of applications. For the petitioners, on the other hand, they have an important impact as they prevent them from suffering disadvantages by the inactivity of the Constitutional Court.[1024] However, the rulings and decisions of the Court do not reveal whether these temporal limitations have an actual significance in practice.

C. Power to extend the scope of review

In accordance with its Croatian counterpart the review competence of the Macedonian Court is not limited to the allegations raised by the petitioners.[1025] As a consequence of its power to initiate and to continue review proceedings at its own discretion it is explicitly entitled on the basis of art. 14 para. 2 and

1022 Treneska-Deskoska, Constitutional Court, 27.
1023 Skarić, 712. See also Čobanov, 194 ff. with further details.
1024 See Čobanov, 190.
1025 See to that effect also Čobanov, 185.

art. 43 para. 2 RoP to extend its assessment and to review other acts and provisions.

In practice however, the Constitutional Court restricts its review to the allegations raised by the petitioners. This complies with its above mentioned restraint to initiate review proceedings at its own discretion.[1026] Only in individual cases, where it considers the unconstitutionality of a provision as violation of fundamental values, does the Court extend the scope of its review. It for instance annulled a legal provision which was contested for the lack of a respective constitutional basis because it considered it as a violation of the rule of law.[1027]

4. Achievement of subjective rights protection

Based on its regulatory autonomy the Macedonian Constitutional Court combined the review proceedings with procedural instruments, which allow petitioners to improve their own legal positions and to enforce their own rights and liberties against state authorities. By filing initiatives petitioners can prevent the implementation of unconstitutional laws or acts of legislation and obtain remedy or compensation for violations, which they have already suffered because such provisions have been applied by the judicial or administrative authorities.

A. Suspension of applicability of laws

In order to prevent the occurrence of harmful consequences before the conclusion of the review proceedings art. 27 para. 1 RoP empowers the Macedonian Constitutional Court to suspend the execution of certain individual acts or activities that have been adopted on the basis of a reviewed legal provision. In accordance with the wording it can order the non-execution of specific acts or activities. By ordering the general non-execution the Court nevertheless grants its rulings a further reaching protective effect which amounts to the temporary non-applicability of the contested legal provision.[1028]

1026 See above at Chapter 2, pp. 74 f.

1027 Ruling U.br.152/2013 of 8 October 2014, n. 5.

1028 E.g. ruling U.br.166/2014 of 1 April 2015, n. 7; ruling U.br.244/2008 of 18 February 2009, n. 6.

Its power to temporarily suspend the applicability of reviewed laws is timely restricted to the duration of the review proceedings. It is contingent on the admissibility of an initiative and ordered together with the ruling to initiate review proceedings.[1029] With its final decision the Court either restores the applicability of the reviewed provisions or invalidates it for being unconstitutional.

In principle the Constitutional Court orders preliminary suspensions upon respective requests but is entitled to do so at its own discretion.[1030] It passes a respective order only if it has reasonable doubts about the constitutionality or legality of a contested provision.[1031] It emphasizes that the lack of grounds for initiating review proceedings entails that the conditions to order preliminary measures are not fulfilled either.[1032] This indicates that the prospect of success of initiatives constitutes a prerequisite for the ordering of this precautionary measure.

In addition, the Court requires that the execution of acts passed on the basis of contested provisions leads to harmful consequences that are difficult to remedy.[1033] It for instance recognized such a possibility in relation to contested spatial and urban plans. Worth mentioning is its order to temporarily suspend the enforcement of acts passed in application of the detailed urban plan of the Capital Skopje, which was contested for interfering with the territorial authority of the neighbouring community of Gazi Baba.[1034] Another noteworthy example is the Court's ruling to suspend the execution of decisions adopted in application of the lustration measures, which excluded persons suspected for having cooperated with the former socialist security service from public offices, unless they submitted a confirmation proving the opposite.[1035]

1029 See SKARIĆ, 713.

1030 See also ČOBANOV, 328 f.

1031 E.g. ruling U.br.149/2013 of 9 April 2014, nn. 5 f.; ruling U.br.166/2012 of 20 February 2013, n. 11.

1032 Illustrative is ruling U.br.180/1992 of 4 September 1992, n. 5 and from the newer practice ruling U.br. 23/2015 of 4 November 2015, n. 5.

1033 E.g. ruling U.br.66/2014 of 25 November 2014, n. 5; ruling U.br.135/1999 of 3 November 1999, n. 7.

1034 Ruling U.br.124/2009 of 24 March 2010, n. 8. See also ruling U.br.67/2014 of 17 December 2014, n. 7; ruling U.br.106/2013 of 18 June 2014, n. 6.

1035 Ruling U.br.52/2011 of 25 January 2012, n. 7, above at fn. 945. The Court abrogated the provisions for violating human dignity by decisions U.br.52/2011 and U.br.76/2011 of 28 March 2012, n. 9.

Although the Constitutional Court itself emphasizes the necessity of a restrictive approach in ordering preliminary suspensions,[1036] the case-law reveals that it does not balance possible detrimental effects of such orders with legal certainty. In its justifications the Court only refers to the possibility of the occurrence of harmful consequences, without however defining these consequences in more detail or balancing them with other interests affected.

B. Legal effect of decisions

As has been shown, the legal effects of decisions to eliminate unconstitutional or unlawful acts of legislation from the normative order are essential for petitioners who seek protection of their personal rights against the legislative authorities.[1037]

The Macedonian Constitutional Court sanctions legislative inconsistencies by abrogating or by annulling unconstitutional or unlawful legislative acts. Although neither the Constitution nor the RoP explicitly provide decisions on the declaration of unconstitutionality, the Constitutional Court does not categorically exclude its power to adopt declaratory decisions.[1038]

Abrogated unconstitutional laws or legal provisions lose their legal validity and cannot be implemented nor executed anymore (*ex nunc*).[1039] Therewith successful petitioners prevent the adoption of final decisions or acts which directly interfere with their rights or legal position. So as to deprive rights violating final and enforceable individual acts from their legal basis, the Constitutional Court is empowered to annul unconstitutional acts of legislation with a retroactive effect (*ex tunc*).[1040] By doing so it provides legal ground for petitioners to request the reconsideration or change of these acts with the responsible authorities within a particular period of time.[1041]

The decision whether to abrogate or to annul unconstitutional or unlawful legal provisions is at the discretion of the Constitutional Court. In contrast to its Croatian and Slovenian counterparts the Macedonian Court is even empowered to annul formal laws if, as to art. 73 RoP, the consequences and violations

1036 Constitutional Court of the Republic of Macedonia, 20.

1037 For a detailed presentation of the legal effects of the decisions, see ČOBANOV, 349 ff.

1038 Constitutional Court of the Republic of Macedonia, 18.

1039 Art. 80 and 81 para. 3 RoP Macedonia.

1040 Constitutional Court of the Republic of Macedonia, 19. See also KALKAŠLIEVA, 87 f.; MUKOSKA-ČINGO, 280 f.; SKARIĆ, 704.

1041 See KALKAŠLIEVA, 87 f.

are considered to be serious. The Court takes into account all circumstances important for the protection of the constitutional order, the degree of violation and the effect for rights protection, without putting into question legal certainty and other important issues for decision-making. The Court for instance annulled laws and regulations for not having been passed in accordance to the proceedings prescribed for legislating.[1042] It moreover annulled provisions because of serious substantial deficiencies, for instance for violating the principle of non-retroactivity,[1043] of university autonomy,[1044] of legality,[1045] and of free market economy.[1046] In practice, however, the Court predominantly abrogates unconstitutional laws or unconstitutional and unlawful regulations, while annulments remain the exception.[1047]

C. Reparation and compensation for violations suffered

Just as its counterparts in Croatia and Slovenia also the Macedonian Constitutional Court reintroduced the right of redress against violations suffered by the application of unconstitutional or unlawful provisions. With this additional remedy, petitioners whose rights have been violated by final decisions or individual acts adopted on the basis of such provisions, can either request the revocation of these acts with the responsible authority or a compensation for damages.

a) Request for revocation

As to art. 81 para. 1 RoP

> «[a]nyone whose rights have been infringed by a final or legally binding individual act adopted on the basis of a law, regulation or other common act which has been revoked by a judgment of the Constitutional Court has the right to request the competent organ to revoke that individual act […].» (*Punctuation added*)

1042 E.g. decision U.br.124/2009 of 1 February 2012, n. 7; decision U.br.241/2007 of 11 June 2008, n. 5.

1043 E.g. decision U.br.159/2011 of 28 March 2012, n. 6.

1044 Decision U.br.42/2012 of 9 May 2013, n. 5; decision U.br.221/2011 of 11 April 2012, n. 6.

1045 Decision U.br.152/2013 of 8 October 2014, n. 4.

1046 Decision U.br.217/2001 of 17 July 2002, n. 7.

1047 ČOBANOV, 346 f.; SKARIĆ, 706 established that five percent of all decisions to invalidate reviewed acts between 1991 and 2003 were annulments.

A revocation of final decisions or acts which have been adopted in application of unconstitutional legal procedures requires the submittal of a respective request to the responsible authority. In accordance with Slovenia but in contrast to Croatia, the right to file such requests to Macedonian authorities only arises on the basis of decisions on annulments of unconstitutional laws and other legal provisions.[1048]

The right of revocation is not limited to the applicants upon whose initiatives provisions have been annulled. It rather comprises every individual or legal person who suffered violations from the application of unconstitutional or unlawful legal provisions. However, the admissibility of such requests requires a proof of a personal concern and legal interest before the responsible authority.[1049] Furthermore, this claim right is limited in time. Requests for revocation can be submitted within six months starting from the day of publication of the Constitutional Court's decision to annul the legal basis.

In practice, however, this right does not have a considerable impact because of the Court's restrained approach to annul unconstitutional legal provisions.

b) Subsidiary request for compensation for damage

Finally, also the Macedonian Constitutional Court introduced a subsidiary remedy for cases where the negative consequences cannot be remedied by revocation of final individual acts. Art. 81 para. 2 RoP accordingly determines that reparation of persons concerned can be granted by a compensation for damage or by other means. In contrast to requests for revocation, which are to be filed with the responsible authority that adopted an unconstitutional provision and therewith directly violated the applicant's rights, the Constitutional Court reserves the competence to order the compensation for damages to itself.[1050]

1048 National Report of the Macedonian Constitutional Court prepared for the XVth Congress of the Conference of European Constitutional Courts, p. 14 see above at fn. 937.

1049 See the Court's explanations <http://ustavensud.mk/?page_id=5207&lang=en> (last accessed September 2018).

1050 SKARIĆ, 704.

IV. Comparative conclusion

As remedies entitling individual persons to request the Constitutional Courts to review the compatibility of acts of legislation with the Constitution, popular complaints continue to exist in the three states considered. This part of the study shows the procedural particularities of the three complaints as provided in Croatia, Slovenia and Macedonia and of the procedural status of petitioners in the judicial review proceedings. Besides several resemblances between the three systems, the Slovene right to petition differs from the other two complaints both in a procedural aspect as well as with respect to its function.

1. Common features of the popular complaints

The analysis reveals close resemblances between the procedural arrangements of the three popular complaints considered. Irrespectively of the insinuated non-committal nature as «proposal», «petition» or «initiative», these complaints are in fact established as a much stronger procedural remedies. The Constitutional Courts are obliged to assess and evaluate every proposal and argument raised individually and in formalized preliminary proceedings and to justify rejections in form of formal rulings. Therewith, the popular complaints obtain the same binding effect as legal remedies.

With a few exceptions comprising the competence to review decisions of the National Assemblies on the scheduling of votes and elections or to review legal provisions which ceased to be effective, the jurisdiction of the Croatian, the Slovenian and Macedonian Constitutional Courts to review normative acts is comparable.

In place of the informal submittals provided under socialist rule, the admissibility of popular complaints requires the fulfilment of conditions regarding form, language and content. All three Courts refuse to consider anonymously filed proposals. Moreover, they lay down relatively high requirements as to the substantiation of complaints. General allegations of normative inconsistencies do not suffice. Rather, the Courts require applicants to explain alleged inconsistencies by explicitly naming the relevant provisions and describing the discrepancies in a comprehensible and complete manner. Only if they succeed in raising reasonable doubts about the constitutionality or lawfulness will the Constitutional Courts review contested provisions. While applicants are given the possibility to correct and supplement incomplete and formally defi-

cient complaints, inadequately substantiated submittals are rejected as inadmissible. As a rule, the principle of *res iudicata* and the subsequent withdrawal of proposals or lapse of procedural requirements constitute procedural obstacles in all three states considered and entitle the Constitutional Courts to reject applications or to close already initiated review proceedings.

A resemblance can also be established with respect to the judicial review proceedings and the procedural status awarded to applicants in the three states considered. While these proceedings were established with the primary purpose to enforce the objective constitutional order against the legislative authorities, they are combined with several procedural elements that allow applicants to protect and improve their own subjective rights and status. This is not only a consequence of the common tradition and continued practice of constitutional adjudication under socialist rule. It is moreover the consequence of the adoption of international standards through the ratification of conventions and the acquisition of membership in international organizations. The right of applicants to be informed and to participate in review proceedings corresponds to the ECHR standards for fair trials, which require an enhanced procedural status of applicants if the criteria of victimhood are fulfilled or if the review proceedings are decisive for the applicants' civil rights or criminal responsibilities.

Similarities also exist with respect to the procedural arrangements combining judicial review proceedings with means that allow applicants to achieve concrete personal legal benefits. Noteworthy is their right to prevent imminent violations of own personal rights by reaching the temporary suspension of the applicability of decisions and concrete acts adopted on the basis of contested laws. The same applies to the right to request reconsideration of decisions and individual acts adopted on the basis of annulled laws, which provides applicants with a redress for already suffered violations.

These procedural particularities indicate that the popular complaints in Croatia, Slovenia and Macedonia are not only established as means to enforce the constitutional order and guarantees as public goods against the legislative authorities. These remedies moreover allow individuals to directly access the Constitutional Courts to achieve protection against violations of their subjective rights as consequence of unconstitutional or unlawful laws or regulations.

2. Distinctive features of the Slovene right to petition

The analysis also reveals distinct features of the three popular complaints. Besides the restrictions mentioned, the entitlement to request the initiation of review proceedings against acts of legislation before the Croatian and Macedonian Constitutional Courts is not subject to any further limitation. The access of individuals is consequently neither limited in time, nor by cost burden, nor by requirements regarding the relevance of the questions raised. Most importantly, the entitlement is not contingent on the demonstration of a legitimate interest in bringing review proceedings. The procedural hurdles for the submittal of popular complaints against acts of legislation are thus very low. In accordance to the original *actio popularis*, these remedies therefore allow a practically unrestricted access of individuals to the Constitutional Courts. The only requirement interpreted rigorously by the Courts is the obligation of applicants to substantiate the existence of a normative inconsistency.

In Slovenia, on the other hand, the rigid procedural treatment of individual access to the Constitutional Court became apparent already from the outset. Complaints and petitions must meet qualitative requirements and must be filed within explicit and implicit temporal limits. Most importantly however, applicants must demonstrate a legal interest in challenging a law or other act of legislation. While the Court required a legal interest already during the first years of its activity, it adopted an ever more strict interpretation in the following years. With its change of practice in 2007 it considerably limited its accessibility by demanding a direct interference of contested legal provisions with the personal rights of the petitioners. Applicants who fail to demonstrate such an immediate effect succeed in proving their direct concern only by additionally filing a valid constitutional complaint against an individual act or decision adopted on the basis of contested provisions.

Chapter 4: Significance of popular complaints from a practical point of view

Unlike constitutional complaints, which are generally considered as important remedies of human rights protection, the right of individuals to contest laws or other acts of legislation is much less appreciated and common. This is all the more true if the right to file complaints does not require a personal concern and legal interest of applicants.

While the preceding Chapter showed the procedural particularities of the popular complaints in Croatia, Slovenia and Macedonia, the following analyses their significance in practice. So as to reveal the practical significance of popular complaints as means of direct individual access, the available statistical information on the practice of the Constitutional Courts from 2002 until 2015 will be analysed in part I. Their practical significance is analysed in comparison with requests filed by authorized applicants. Whether they serve as means for subjective rights protection from the perspective of the applicants is shown by the comparison of the respective data with the numbers relating to constitutional complaints. The analysis of the success rate allows the drawing of conclusions on the difficulty for individuals to fulfil the procedural requirements and on the practice of the Constitutional Courts in handling popular complaints.

In part II an overview of the case-law of the last twenty-five years reveals to what extent these remedies have contributed to the enforcement of the Constitutions in the three states and to the consolidation of human rights, constitutionalism and the rule of law.

I. Evaluation of statistical data

1. Right of proposal in Croatia

The statistical information about the work of the Croatian Constitutional Court from 1990 until today can be found on its website[1051] and is relevant for the compilation below. The available information only comprises the kind and number of applications filed during the respective period and the amount of cases decided by the Constitutional Court. As consequence of the limited data available, the table is incomplete.

	Total submittals	Constitutional Complaints	Judicial review proceedings			
			Total applications	Proposals submitted by individuals and legal persons	Thereof % of proposals	Success rate %
2002	3,310	2,584	236			
2003	4,254	3,373	255			
2004	5,170	3,602	535			
2005	5,232	3,148	476			
2006	4,296	3,764	402			
2007	4,847	4,173	389			
2008	5,768	5,219	254			
2009	6,041	5,202	315			
2010	7,453	5,626	1,629			
2011	6,374	5,597	512			
2012	6,560	5,980	236			
2013	6,324	5,627	386			
2014	8,195	5,138	2,813			
2015	5,138	4,595	365			

A. Workload resulting from individual access in general

a) Constitutional complaints

As shown the entitlement to file constitutional complaints has been gradually restricted by legal changes of the CCL and by the adoption of a more restrictive interpretation by the Constitutional Court itself. Nonetheless, the statistics

[1051] The statistics are published in English on the website of the Croatian Constitutional Court <https://www.usud.hr/en/statistics> (last accessed September 2018).

reveal that the Court suffers from an immense amount of submitted constitutional complaints. Ever since 2008 it receives approximately 5,000 constitutional complaints annually. In 2012 their amount even exceeded the number of 6,000. The considerable predominance of these complaints, ranging between 80 and 90 percent of all submittals received annually by the Court, reveals that constitutional complaints are the main reason for its chronic overload.

b) Submittals for judicial review

The number of proposals filed for the initiation of judicial review proceedings is considerably lower. The table shows that since 2002, the number of requests submitted per year ranges steadily between 200 and 560 and amounts to less than ten percent of the Court's workload. The two upswings of submittals received in 2010 and in 2014 were a consequence of the adoption of two legislative acts to overcome critical financial situations. The enactment of the Law on the Reduction of Pension Payments in 2010 led to the submittal of over 1,000 proposals.[1052] Altogether 1,146 proposals have been filed in 2014 against the Law on the Denial of the Right to Salary Increase based on Actual Years of Service, and 1,122 against the respective Decree prolonging the legal validity of this Law for three months.[1053]

B. Relation to requests filed by authorized applicants

The available data regarding the submittals to initiate judicial review proceedings do not reveal the amount of proposals filed by individuals. Respective indications can be found elsewhere. In his speech on the occasion of the celebration of the fifteenth anniversary of the Croatian Constitutional Court, Former Court President PETAR KLARIĆ speaks of even 99 percent of proceedings instituted upon proposals filed by individuals, while in only one percent of cases the applicants were state organs and other authorized bodies.[1054] The

1052 In ruling U-I-3610/2010 of 15 December 2010, NN 4/11, the Constitutional Court rejected the proposals for the lack of competence to decide on the expediency of laws.

1053 These numbers have been provided by the Constitutional Court on request. See the relevant ruling U-I-1625/2014 et al. of 18 July 2014, n. 13, and decision U-I-1625/2014 of 30 March 2013, see above at fn. 658.

1054 Page 5 of the President's speech, published in English on the website of the Constitutional Court <www.usud.hr> (last accessed September 2015).

high percentage of proposals filed has been confirmed by the former President of the Constitutional Court JASNA OMEJEC.[1055]

This indicates a considerably higher activity of individuals and other legal persons in contesting laws and other general acts than of state organs and the ombudsperson as authorized applicants. Despite their power to submit binding requests to the Constitutional Court and their constitutional obligation to protect the constitutional order, these qualified applicants still show much more restraint in requesting the review of laws and other general acts.

C. Proposals as remedies for subjective rights protection

a) Clear prevalence of constitutional complaints

In comparison with the number of constitutional complaints considerably less submittals are filed for the initiation of initiate judicial review proceedings, from which the vast majority is submitted by individual persons. Not even amounting to ten percent of the entirety of submittals received, this shows that the right of proposal is exercised to a much lower extent by individuals than the constitutional complaint. This clear divergence is somewhat surprising, since – although differing with respect to the objects of appeal – principally the same protection can be achieved by both legal remedies. By submitting constitutional complaints against decisions or other concrete state acts, applicants can achieve the abrogation of contested individual acts and of their legal bases by incidental review proceedings. Alternatively, individuals can cause the abolition of contested legal provisions by proposing the initiation of review proceedings and thereafter claim the reconsideration of individual acts that have been adopted in application of abrogated provisions.

In contrast to constitutional complaints, the right to file proposals is practically unrestricted. So far, not even the measures undertaken in restricting the access by constitutional complaint eased the Constitutional Court's workload. Despite the enhancement of the procedural hurdles for their admissibility, constitutional complaints still clearly constitute the primary legal remedy for the protection of rights and liberties.

1055 OMEJEC, O potrebnim promjenama, 87.

b) Reasons for the prevalence of constitutional complaints

The merely secondary practical significance of proposals as remedies for the protection of rights and liberties is apparent. It shows that individuals principally contest individual acts that are addressed to them and directly interfere with their legal position. This can be explained with the higher awareness of a personal concern than with respect to laws and other acts of legislation which regulate rights and obligations in an abstract and general way. Moreover, the constitutional complaint is embedded in the general consciousness as classic legal remedy for the protection of the constitutionally guaranteed rights and liberties also in Croatia.

Finally, the enormous amount of constitutional complaints received year per year is also a result of the still persisting widespread perception of the Constitutional Court as instance of appeal against unfavourable court decisions.[1056] This perception is attributed to persisting general procedural and institutional deficiencies such as the threshold for the value of claims before the Supreme Court, which causes the submittal of numerous appeals with a low value in dispute to the Constitutional Court.[1057] But also the Court itself is made responsible in this respect.[1058] It is criticized for reinforcing the wrong perception of its function by its incoherent practice regarding the admissibility of constitutional complaints and its failure to restrict itself to the assessment of the constitutionality of contested state acts. Finally, the overburdening is also attributed to persisting ambiguities with respect to the procedural arrangements before the Constitutional Court. As has been shown above – instead of limiting its assessments to the admissibility of complaints – the Court frequently decides on their merits already in the preliminary proceedings.[1059]

1056 Detailed discussions on this and other reasons can be found in OMEJEC, O potrebnim promjenama, 106 ff.; KRAPAC, Postupak pred Ustavnim sudom, n. 52.2.

1057 KRAPAC, Postupak pred Ustavnim sudom, n. 52.2.

1058 OMEJEC, O potrebnim promjenama, 44 f.; KRAPAC, Postupak pred Ustavnim sudom, n. 52.3

1059 KRAPAC, Pretpostavke za pokretanje i vođenje, 183. Compare in this regard BELAJEC, 111 f., KRAPAC, Pretpostavke za pokretanje i vođenje, 184 and CRNIĆ, Komentar Ustavnog zakona, 286.

D. Success rate of proposals

a) Low success rate

The statistical data published on the website of the Constitutional Court does not disclose the success rate of applications and the consequent invalidation of unconstitutional laws and regulations. Also here respective references can be found in other sources. In his solemn speech former President of the Constitutional Court PETAR KLARIĆ stated a continuing decrease of successful review applications from initially ten to 3.3 percent in the period between 2001–2005. According to available information provided by the Constitutional Court it abrogated or annulled contested laws in merely eight percent of cases and contested regulations in eight percent of cases during the entire period of its activity from 1990 until 2012.[1060] This information clearly demonstrates the low success rate of applications filed to the Constitutional Court and accordingly shows that submitted proposals fail to a wide extent.

b) Reasons for the low success rate of proposals

The case-law shows that the vast majority of proposals fails for not fulfilling the admissibility requirements and for being unfounded.

Considering the low procedural hurdles for admissibility this finding surprises. During the initial period after transition the low success rate was explained with the lack of experience and knowledge about the jurisdiction and requirements for accessing the Constitutional Court.[1061] The analysis of the recent case-law reveals an even lower success rate twenty-five years later. A great number of proposals is still rejected as inadmissible for being filed against acts without a general and abstract nature. This confirms a still persisting ignorance about the Constitutional Court's jurisdiction.[1062] This can be regarded as inattentiveness of petitioners or as a lack of legal certainty about the Court's function and powers, which – as shown – is attributed to deficiencies of procedural regulations and to a certain extent also to the inconsistent practice of the Court.

1060 The respective data has been provided by Secretary General of the Constitutional Court TEODOR ANTIĆ.

1061 CRNIĆ, Postupak pred Ustavnim sudom, 1.

1062 See to this effect CRNIĆ, Postupak pred Ustavnim sudom, 1; OMEJEC, Granice ovlasti Ustavnog suda, 1453 f.

Besides, the amount of rulings dismissing proposals as unfounded is considerable as well. Certainly a large number of proposals are dismissed as attempts to achieve the elimination of possibly detrimental regulations. Also notable are dismissals of proposals for the failure of applicants to provide sufficient reasons to put into doubt and to demonstrate the incompatibility of contested legal provisions with the Constitution. This can be attributed to the difficulty to substantiate alleged normative and abstract inconsistencies. On the other hand, the pertinent case-law indicates that the Constitutional Court puts high demands as to the substantiation of alleged normative inconsistencies. In consistent practice it emphasizes the discretionary power of legislative authorities in legislating and in regulating political fields and presumes the constitutionality of laws and of governmental acts.[1063] This presumption is refuted only if provisions «cannot be interpreted in a constitutional way, or if they cannot be interpreted at all […]».[1064] The high requirements to the substantiation of proposals can be seen as consequence of this presumption and the wider discretionary power conceded to the legislative authorities.

They can also be seen as result of a self-restraint of the Constitutional Court towards the legislative power. In contrast to its initial practice, which is described as activist,[1065] its approach today is considered as predominantly self-restrained.[1066] While a thorough analysis of its practice and its approach exceeds the scope of this study, it is noteworthy, that there is principle unanimity in Croatian constitutional doctrine about the necessity of a «moderate judicial activism» by the Constitutional Court for the consolidation of the human rights and the rule of law.[1067]

1063 See for instance, ruling U-II-4490/2007 of 9 November 2010, n. 9, not published; ruling U-I-2744/2003 of 8 February 2006, n. 11, NN 20/06.

1064 See decision U-II-993/1997 et al. of 8 November 1999, NN 129/99.

1065 E.g. SOKOL, Ustavna interpretacija, 20. For detailed assessment of the Court's practice until 2001 see CRNIĆ, Ustavni sud Republike Hrvatske, 131 ff.

1066 For detailed discussions see BAČIĆ PETAR, 421 ff.; OMEJEC, Granice ovlasti Ustavnog suda, 1447 ff.; SMERDEL/SOKOL, 201; SOKOL, Ustavni sud, 1165. SMERDEL, Ustavno uređenje Europske Hrvatske, 451 ff. and GARDAŠEVIĆ, 85 ff., esp. 103 however recognize a certain judicial activism of the Constitutional Court.

1067 See BAČIĆ PETAR, 421 and 424; SMERDEL/SOKOL, 201 f.; SOKOL, Ustavni sud, 1165 ff.

2. Right to petition in Slovenia

The following statistical information is compiled from the data published in the Annual Reports of the Slovene Constitutional Court. The reports starting from the year 2000 can be retrieved from its website in Slovenian while from 2010 onwards they are published in English as well.[1068]

	Total submissions	Constitutional Complaints	Judicial review proceedings			
			Total applications[1]	Petitions submitted by individuals and legal persons	Share of petitions in %[2]	Success rate in %[3]
2002	1,213	767	430	411	95.6	23.9
2003	1,072	798	257	248	96.7	16.3
2004	1,271	883	373	355	95.2	27.7
2005	1,877	1,310	347	312	90	20.2
2006	3,053	2,546	474	423	89.3	19
2007	4,354	3,937	367	336	91.6	14
2008	3,562	3,132	323	299	92.6	10
2009	1,845	1,495	308	281	91.2	10.4
2010	1,880	1,582	287	235	81.9	>6
2011[4]	1,869	1,358	323	283	87.6	15.8
2012	1,731	1,203	324	270	83.3	8.9
2013	1,509	1,031	328	247	75.3	7.4
2014	1,392	1,003	255	202	79.2	10
2015	1,348	1,003	212	151	71.2	8.1

[1] The total number of applications filed for judicial review comprises applications, which were joined based on art. 48 RoP because they related to identical issues.

[2] The percentage indicating the share of petitions from the number of applications for judicial review is derived from the Annual Reports, which contain data on the percentage of requests submitted by the state organs and other qualified applicants.

[3] Because of the Court's competence to abrogate provisions of several laws or regulations and to, at the same time, dismiss or reject single applications by one and the same decision, it is difficult to precisely determine the success rate in relation to the petitions filed. The available data on the success rate hence relates to the entirety of requests and petitions resolved in the relevant year.

[4] A special register (R-I) has been introduced in 2011 with art. 37 para. 3 RoP for all inadmissible or manifestly ill-founded applications. While in the table the total number of submittals received comprises these applications as well, they are not considered in the number of submitted constitutional complaints and applications for judicial review proceedings.

1068 The English Reports can be retrieved from <http://www.us-rs.si/en/press/annual-reports> (last accessed September 2018).

A. Workload resulting from individual access in general

a) Constitutional complaints

Since its reintroduction in 1991 the constitutional complaint constitutes the access right with the highest practical importance for the Constitutional Court. Ever since the procedural requirements have been considerably restricted by legal amendments and by the adoption of a more restrictive interpretation by the Court itself. These measures aimed at the achievement of a clear distinction from the jurisdiction of the judiciary and at the reduction of the considerable number of complaints. While steadily increasing since 2000, the number of complaints submitted annually permanently exceeds the one thousand mark since 2005. The peak was reached in 2007 with a total of 3,937 constitutional complaints filed.

The Court itself explained this increase with the large number of complaints submitted in misdemeanour proceedings, of which a considerable part constituted so-called «standardized applications» (*tipizirani vlogi*). Such complaints contained only general allegations or differed from already dismissed complaints only with respect to the applicant's names or contested state acts. Because the complainants acted against their better knowledge about the inadmissibility or the lack of prospect of success, these complaints were considered as abusive.[1069] Not least in response to that did the legislator with the enactment of the CCA 2007 exclude disputes in misdemeanour cases from the jurisdiction of the Constitutional Court and introduced sanctioning fees for misuses of access rights.[1070] These measures showed their effect in 2009, when the number of annually submitted complaints decreased to around 1,500.[1071] Henceforth, the recent years show a slight further decline from 1,203 complaints received in 2012, to 1,031 in 2013 and to 1,003 received in 2014 and in 2015.

Nevertheless, the total number of constitutional complaints remains very high. Since 2000 their average share in relation to the total of submittals filed to the

1069 See Annual Report 2007, 8.

1070 The Court accordinlgy imposed 26 sanctions onto complainants in the year 2013, see Annual Report 2013, 42. See for instance ruling Up-1182/2012 of 24 April 2013, n. 4, not published; ruling Up-448/2012 of 21 June 2012, n. 6, Uradni list 57/12.

1071 Annual Report 2009, 18 f.

Constitutional Court remains above 75 percent.[1072] This shows that this access right constitutes its main work burden, irrespectively of the high access requirements.

b) Submittals for judicial review

The table reveals that since 2002 over 62 percent of applications received annually by Constitutional Court have been constitutional complaints. As shown above, the peak was reached in 2007, when their share amounted to even 90 percent of all applications. These numbers illustrate that the workload of the Constitutional Court in reviewing laws and other general acts, which ranges consistently between around 10 and 30 percent or between 202 and 423 submittals per year, is much lower.

B. Relation to requests filed by authorized applicants

The table shows that the vast majority of applications filed against acts of legislation are submitted by individuals and other legal persons. The state organs and the other authorized applicants are considerably more reserved in requesting the initiation of review proceedings against legislative acts. This restraint is frequently criticized by the Constitutional Court in its Annual Reports.[1073] This particularly applies to the failure of courts to request the initiation of concrete review proceedings against applicable laws or regulations, which induces the Court to regularly emphasize their primary responsibility in protecting the Constitution and the constitutional rights and liberties. Not least because of the more restrictive interpretation of the direct legal interest adopted in 2007, one can observe a slight shift of the numbers of petitions and of requests.[1074] The Constitutional Court itself acknowledges that the current trend, showing a slow decrease of its workload, is to be attributed to these changes as well.[1075]

1072 See the statistical data in the individual Annual Reports for the years 2000–2013.

1073 E.g. Annual Report 2008, 18.

1074 The Constitutional Court established that from 324 applications to initiate review proceedings received in 2012, 54 requests were filed by qualified applicants, whereof 26 by courts, see Annual Report 2012, 38. The statistical data in its Annual Report 2014 show a reduction of requests filed. From 53 requests received in total, 16 were filed by courts. In 2015 finally, 61 from 212 submittals were filed by state organs, whereof 38 by courts.

1075 Detailed to the numeric developments in Annual Report 2013, 41 ff.

C. Petitions as remedies for rights protection

a) Clear prevalence of constitutional complaints

The practical importance of constitutional complaints has grown steadily since the enactment of the CCA in 1994. The comparatively few petitions filed show that this legal remedy has lost its initially prevalent significance as remedy for rights protection. Rather, individuals and legal persons seek protection of their rights and liberties before the Constitutional Court by filing constitutional complaints.

The increase of access requirements in 2007 brought a considerable decline in the number of new applications in general.[1076] These reforms showed their most obvious effect in 2009, when the number of constitutional complaints submitted was reduced for even 48.2 percent.[1077] At the same time, they did not essentially impact the amount of petitions submitted for constitutional review which ranges steadily between 202 and 423 already since 1991. As consequence of the adoption of the rigid interpretation of the directness of the legal interest of petitioners, constitutional complaints became even more significant for human rights protection. This trend has been confirmed by the Constitutional Court, who established that it increasingly receives «joined cases» where petitions are filed in connection with constitutional complaints and decided by a single decision.[1078]

b) Reasons for the secondary significance of petitions

The decline in the number of constitutional complaints did not change the predominance of this legal remedy for the protection of the constitutional rights and liberties. In accordance with what has been said with respect to Croatia, this prevalence can be explained therewith that individuals primarily contest state acts of an individual and concrete nature. Besides a higher awareness of impairment, this can be considered as consequence of their primary incentive to protect their personal legal position against direct violations. Just as in other

1076 Annual Report 2007, 15; Annual Report 2009, 18.

1077 KAUČIČ/PAVLIN/BARDUTZSKY, 361.

1078 For the year 2012, from 270 petitions, 118 constituted related issues. For the year 2013, 149 of the 247 petitions were filed together with constitutional complaints, in 2014 it received 73 related issues from 202 petitions filed in total and in 2015 even 110 of the 151 petitions were filed together with constitutional complaints. See Annual Report 2015, 10; Annual Report 2014, 9; Annual Report 2013, 41 ff.; Annual Report 2012, 37.

states with a concentrated constitutional judiciary, the high number of constitutional complaints shows that they are perceived as primary remedies for the protection of personal rights and liberties in Slovenia as well. Also here, finally, the prevalence of constitutional complaints is attributed to the still persisting perception of the Court as instance of appeal and of these complaints as remedies for the assessment of the legality of individual state acts.[1079]

The figures in the table reveal a steady decrease in the number of petitions filed as consequence of the more rigid interpretation of a direct concern of petitioners. Not least the introduced requirement of a procedural and contextual correlation with constitutional complaints can be seen as cause for the lower practical significance of petitions as remedies for subjective rights protection. The obligation to demonstrate a direct legal interest in the abrogation of a contested law or regulation and the need for legal protection constitute considerable hurdles for petitioners. While it is difficult to prove a direct impairment by a general regulation, it appears to be the more simple way to achieve protection by directly filing constitutional complaints instead of having to fulfil both requirements for the admissibility of petitions and for complaints.

D. Success rate of petitions to initiate judicial review

a) Declining success rate

The table above shows that applications for judicial review only succeed in the minority of cases. Pursuant to the available data the success rate of requests and petitions used to be higher than it is in recent years. Accordingly, it ranged between 19 percent in 2006, and 27.7 percent in 2004. As a consequence of the increased demands for demonstrating a direct legal interest the Constitutional Court in 2008 rejected even 360 petitions for not meeting the new requirements.[1080] Thereafter, one can establish a decline of successful petitions.[1081] In recent years the percentage of successful applications accordingly ranges around 10 percent, with a short increase in 2011, where the Court abrogated numerous local regulations on the categorization of local roads for violating the right to ownership.[1082] Not considered in the already low amount

1079 TESTEN, Komentar Ustave art. 160, n. 36.
1080 Annual Report 2008, 22 f.
1081 See Annual Report 2007, 18 and Annual Report 2008, 22.
1082 Annual Report 2011, 63 and table 12.

of successful petitions indicated in the table are the applications registered in the general register R-I for being inadmissible or manifestly unfounded. Also the Constitutional Court itself observes that the success rate of petitions is continuously low.[1083] At the same time it however establishes a slow increase of the overall success of submittals on the initiation of review proceedings, attributed to the growing number of requests filed by qualified applicants.[1084]

b) Reasons for the low success rate

The case-law shows that most petitions are rejected for being inadmissible, while the rate of dismissals is considerably lower.[1085] Among the main reasons for their inadmissibility, one can find the lack of jurisdiction of the Constitutional Court and the failure of petitioners to comply with the requirements regarding the form and content and pertinent time limits. A considerable number of petitions are moreover rejected for not meeting the qualitative requirements prescribed.

The decrease in the success rate of petitions starting from 2008 indicates that the adoption of the rigid interpretation of the direct legal interest of petitioners in 2007 became the highest hurdle for the admissibility of petitions.[1086] The analysis of the recent practice reveals that petitioners fail to demonstrate their direct concern and prospect of improving their personal legal position. Very often, they fail to substantiate a direct impairment of their rights and liberties. Many petitioners fail to demonstrate their indirect legal interest for not concurrently submitting a procedurally or contextually correlated and valid constitutional complaint. This complex system of combined and intertwined admissibility requirements can be regarded as essential cause for the amount of rejections of petitions by the Constitutional Court.

At the same time, the number of petitions dismissed for being unfounded is essentially lower. In contrast to Croatia, the amount of petitions filed in dissatisfaction with laws or regulations considered as detrimental to personal legal positions is lower because of the restriction of the access to persons with a legal interest. Yet, the question of the approach of the Constitutional Court in relation to the legislative power arises also in Slovenia. While a detailed

1083 E.g. Annual Report 2015, 12.

1084 Annual Report 2013, 44 f.

1085 The data for the years 2009–2014 can be found in table 12 of the Annual Report 2014, 55. Accordingly also RIBIČIČ, Strengthening constitutional democracy, 10.

1086 See also TESTEN, Komentar Ustave art. 162, n. 21.

analysis of the pertinent case-law in this respect exceeds the objective and the scope of this study, it is notable that also the Slovene Court is perceived to, initially, have followed a more activist approach in reviewing acts of legislation and in intervening into the political processes for the consolidation of the rule of law and the new constitutional principles.[1087] Today however, also the Slovene Court's approach towards the legislative authorities is perceived as generally self-restrained, while in individual cases, the Court is still acclaimed for its activist approach in enforcing human rights and liberties and other constitutional guarantees.[1088]

1087 CERAR, 383 f., 386; LUKŠIČ, 765 f.; RIBIČIČ, Constitutional Democracy, 291 ff.

1088 MAVČIČ, Slovenian constitutional review, 59 f. RIBIČIČ, Constitutional Democracy, 301 f., however, criticizes that the Court is too restraint in reviewing legislative acts while following a stringent approach in accepting petitions and in allowing access to constitutional judiciary. See in this regard also n. 43 of dissenting opinion of judge CIRIL RIBIČIČ to ruling U-I-303/2007 of 20 March 2008, see above at fn. 837.

3. Initiative for judicial review in Macedonia

The following statistical information is compiled from the data published in the Annual Reports of the Macedonian Constitutional Court, which can be retrieved from its website in Macedonian language.[1089]

	Total submissions	Constitutional Complaints	Judicial review proceedings			
			Total initiatives[1]	Thereof initiatives submitted by individuals[2]	Share of initiatives in %	Success rate %[3]
2002	205	14	191	140	73.3	28.3
2003	208	10	198	157	79.3	18.3
2004	412	18	391	313	79.4	10.9
2005	238	9	229	188	82.1	13.9
2006	240	6	234	189	80.8	27.5
2007	270	7	263	189	71.8	23.7
2008	263	5	257	209	81	27
2009	290	15	273	228	83.5	16.1
2010	230	9	220	185	84.1	18.2
2011	236	23	213	180	84.5	10.3
2012	205	25	179	141	78.8	11.2
2013	170	22	147	116	78.9	7.5
2014	173	13	159	130	81.8	7
2015	128	13	115	105	91.3	8

[1] The total sum is calculated from the available data which indicates the total number of initiatives by individuals (the Annual Reports refer to «citizens»), to which the quoted number of other applicants is added and the number of constitutional complaints and of applications regarding other competences subtracted.

[2] As shown, the procedural rules only provide one way of petitioning the initiation of review proceedings. Consequently, the state organs and other public bodies are equally entitled for the submittal of initiatives as individuals and legal persons. This column merely considers initiatives submitted by individuals.

[3] The success rate must be considered in relation to the total cases resolved by the Constitutional Court in the respective year and not in relation to the submittals received. Until 2008 the indicated success rate relates to the entirety of proceedings conducted, comprising constitutional complaints, constitutional review and other proceedings. Available data refer specifically to the success rate of initiatives for the initiation of constitutional review proceedings only as of 2009.

1089 The numbers and statistics are retrieved from the Annual Reports published since 2002 in Macedonian language on <http://ustavensud.mk/?page_id=4643> (last accessed September 2018).

A. Workload resulting from individual access

a) Constitutional complaints

In comparison to Croatia and Slovenia, the number of constitutional complaints submitted to the Macedonian Constitutional Court has been low ever since the reintroduction of these remedies in 1991. While until 2010 it ranged between eighteen and merely five complaints submitted per year, in 2011 it surpassed the mark of twenty, only to fall back again to thirteen in 2014. It is striking that also its practical significance as means of individual access is considerably lower and amounts to merely ten percent of all submittals annually filed since 2011. Over and above, in its twenty-five years of activity the Court only considered *one single complaint* as founded. In that case, the Court abrogated a decision of the Electoral Commission for violating the complainant's right to political activity because it did not take into consideration that he had been released from his conviction of possessing illegal weapons and explosives by the Amnesty Act.[1090] All other constitutional complaints submitted during this period were rejected for the lack of jurisdiction or another procedural hurdle, or they were dismissed for being unfounded. It is therefore not surprising that in legal doctrine one can find designations of the Macedonian complaint as a mere «substitute» for constitutional complaints,[1091] or references to a merely «subsidiary significance» in Macedonian constitutional adjudication.[1092]

Different reasons can be found explaining the small practical significance of constitutional complaints. The Constitutional Court itself regards it as consequence of the restricted scope of rights protected.[1093] Other opinions consider it as result of the unclear distinction between the jurisdiction of the Constitutional Court and the judiciary.[1094] Also the existence of other remedies that allow less constrained individual access to the Constitutional Court is named as cause.[1095] Eventually, another reason appears to be the fact that the entitlement to file constitutional complaints is reserved to natural persons.

1090 In decision U.br.84/2009 of 10 February 2010 (English translation available).
1091 Skarić, 710.
1092 Čobanov, 292.
1093 Constitutional Court of the Republic of Macedonia, 48.
1094 Mukoska-Čingo, 255 f.; Skarić, 697, 707 f.
1095 Čobanov, 291 f.

b) Submittals for judicial review

Also the data regarding the workload from judicial review proceedings reveal an essentially different picture than in Croatia and Slovenia. The Macedonian Court receives considerably more initiatives to initiate review proceedings against acts of legislation than constitutional complaints against individual acts. Since 2002 and until 2011, the amount of initiatives ranges above 90 percent of the entirety of submissions filed and even surpassed 97 percent in the period between 2006 and 2008. This steadiness is not least a consequence of the lack of reforms conducted over the years with respect to its accessibility and the Court's practice in interpreting admissibility requirements.

B. Relation to initiatives filed by other applicants

It has been shown that the Macedonian state organs and other public institutions are not vested with a qualified entitlement to request the review of acts of legislation. In its Annual Reports the Court provides specific numbers of initiatives filed by individuals and by state organs and other legal subjects. The available information reveals that with between 70 and 85 percent individuals are by far the most active applicants followed by legal persons, such as economic enterprises and citizen associations.[1096] This shows that also in Macedonia, state organs and local governments remain passive in this regard. This predominance of individuals as applicants has already been established for the time before the period considered in this study.[1097]

C. Initiatives as remedies for subjective rights protection

a) Clear prevalence of initiatives

In contrast to the amount of initiatives filed by individuals, the number of constitutional complaints submitted is considerably lower. Expressed as percentage, in more than 90 percent individuals accessed the Court by submitting initiatives against laws and other general acts. Besides, the number of constitutional complaints filed is remarkably lower than the amount of complaints filed in the same period in Croatia and Slovenia. This clearly shows that the Macedonian constitutional complaint plays a merely secondary role as access right and as legal remedy for the protection of the constitutionally guaranteed

1096 See also SHASIVARI, 62 who in this respect speaks of «citizen activism».

1097 For the data covering the period between 1993 and 2005 see Constitutional Court of the Republic of Macedonia, 48 f.

rights and liberties. Consequently, the Court is predominantly accessed by way of initiatives and provides protection against laws and other general acts. The tendency of a slight increase of constitutional complaints as of 2011 has been disrupted again in the last years. Nevertheless, in contrast to their range between two and nine percent in the initial years, the number of complaints received by the Court today amounts to about ten percent of all applications filed by individuals.[1098]

b) Reasons for the prevalence of initiatives in practice

As shown, the low number of constitutional complaints filed by individuals can be explained with the restricted entitlement and the limited scope of rights protected by this legal remedy. By submitting initiatives, on the other hand, individuals are not only granted unrestricted access to the Constitutional Court, but they can also achieve protection of all rights and liberties and constitutional guarantees. Accordingly it appears to be easier for individuals to obtain protection by filing initiatives.

Overall, the statistical data reveal a slight and gradual decline of the number of initiatives received by the Constitutional Court. Whether this indicates a slow reversal of the practical significance of popular and constitutional complaints in Macedonia, is to be proven in the following years. So far, these developments cannot be attributed to legal reforms or to changes of practice of the Constitutional Court in accepting initiatives or complaints for consideration. In view of the situations in Croatia and Slovenia, a possible cause could be the growing perception of the Macedonian Constitutional Court as court of appeal as well. The amount of rejections of complaints for merely alleging discrimination in order to achieve the abrogation of adverse court decisions or administrative acts seems to support such an argument. However, the envisaged extension of the protective scope of constitutional complaints is a strong indicator for a future change of their practical significance in Macedonia.

1098 This increase has been recognized by the Constitutional Court see Annual Report 2012, 11.

D. Success rate of initiatives on constitutional review

a) Declining success rate

The available information on the success rate of initiatives filed to the Constitutional Court indicates a similar development as established in Slovenia. In the period between 1991 and 1995, the amount of applications which resulted in the invalidation of contested laws and acts of legislation surpassed 20 percent.[1099] This success rate can be considered as high. Pursuant to newer sources it continued to be this high until 2008, with a peak of 28.3 percent reached in 2002 and slight decreases in 2004 and 2005. Since 2009, however, the available data show a downward trend to a success rate which today ranges below ten percent.

b) Reasons for the low success of initiatives

According to the data in the Annual Reports the low success rate can be attributed to rejections of inadmissible initiatives and to their dismissals for being unfounded. While until 2007 the Constitutional Court rejected and dismissed initiatives to a similar extent, the available information shows that, starting from the year 2008, the amount of dismissals of unfounded initiatives is at least twice as high as the number of rejections of inadmissible initiatives.

Initiatives are often rejected for not being filed in accordance to formal demands or for the existence of procedural hurdles. The most frequent reason for their inadmissibility is the lack of competence of the Constitutional Court. This indicates a lack of legal certainty about its jurisdiction and powers. Legal doctrine attributes this uncertainty to the Court's failure to establish a consistent practice in its twenty-five years of activity.[1100] Other scholars invoke the inadequacy of the decisions and rulings, which often only contain literal renditions of applicable provisions instead of founded arguments and concretizations.[1101]

The large number of dismissal of unfounded initiatives can be seen as a consequence inherent to an unrestricted right of appeal of individuals. Accordingly, the Constitutional Court receives numerous initiatives filed with the ob-

1099 For the statistical data for the period between 1991 and 1995 see ČOBANOV, fn. 1641.
1100 ČOBANOV, 215 f.; TRAJKOVSKA-HRISTOVSKA, Access to Constitutional Justice, 11 f.
1101 TRENESKA-DESKOSKA, Constitutional Court, 30.

jective to achieve the invalidation of potentially adverse legal provisions. Besides, many initiatives fail because they do not succeed in sufficiently substantiating an alleged inconsistency of a contested legal provision with the Constitution and the laws. As said above, this can be reasoned with the difficulty to explain and to demonstrate inconsistencies between provisions of a general and abstract nature.

It can also be seen as a consequence of high demands posed to the substantiation of initiatives and the insufficiency of general allegations. The analysis of the pertinent case-law accordingly reveals that the Macedonian Constitutional Court frequently invokes political discretion when dismissing allegations of a normative inconsistency as unfounded. Eventually, this is a consequence of its reserved approach towards the legislative authorities. While its strong institutional position granted by the regulatory autonomy fuelled fears of a judicial activism and interferences into the political sphere, these fears at last proved to be unfounded. The Court's practice indicates a restrained approach in accepting to review the constitutionality of acts of the legislator.[1102] Indicative are its restraint in initiating review proceedings at its own discretion and its refusal to review legal loopholes or to assess parliamentary decisions on popular votes and elections. This restraint is criticized among constitutional scholars, for one thing as a lack of boldness of the Court in using its strength and in providing effective protection of the constitutional guarantees[1103] or as a way to prevent having to decide on delicate political issues.[1104] Finally, its approach is not last deemed to be a consequence of the lack of independence of the Constitutional Court from the governing majority in the Assembly as electoral body of the judges.[1105]

II. Enforcement of constitutional guarantees

Despite the established low success rate in relation to the amount of complaints filed, the analysis of the practice of the Constitutional Courts during

1102 Detailed in Trajkovska-Hristovska, Access to Constitutional Justice, 10 ff. See also Čobanov, 183; Mukoska-Čingo, 227; Treneska-Deskoska, Constitutional Court, 20.

1103 Trajkovska-Hristovska, Control of Constitutionality, 12.

1104 Trajkovska-Hristovska, Access to Constitutional Justice, 11 f.

1105 Discussion with Professor Treneska-Deskoska of 4 April 2014.

their twenty-five years of activity reveals that not a few laws, legislative acts and provisions have in fact been reviewed in proceedings, which were initiated by individual persons. During this period, popular complaints in Croatia, Slovenia and Macedonia consequently led to the invalidation of several acts of legislation and legal provisions that were inconsistent with the newly enacted Constitutions. Not only could this be achieved by successful complaints upon which contested provisions were abrogated or annulled. In several instances already the mere rulings to accept popular complaints for consideration induced the legislators to eliminate deficiencies of contested provisions. Whether the substantiations of the applicants or the extended scope of review by the Court were decisive for the abrogation of contested provisions is finally irrelevant for the influence of popular complaints on the enforcement of the Constitutions against the legislative authorities.

The following analysis shows the impact of popular complaints on the enforcement of the Constitutions against the legislative authorities during the past twenty-five years. It reveals that, overall and despite their low success rate in relation to the number of complaints filed, these remedies can be considered to have contributed and to still contribute to the protection and advancement of fundamental constitutional guarantees comprising fundamental rights (1), the rule of law (2) and democratic proceedings to a significant extent (3).

1. Protection and promotion of human rights

A. Principle of proportionality

The principle of proportionality, which protects individuals from excessive interferences into their legal positions, belongs to the fundamental constitutional criteria in all three states.[1106] Ever since their transformation the Constitutional Courts of Croatia, Slovenia and Macedonia abrogated numerous legal acts for disproportionally restricting rights and liberties. Thereby, popular complaints played and still play an important role in detecting such violations by the legislators.

[1106] While explicitly prescribed in art. 16 para. 2 Croatian Constitution, both the Slovene and the Macedonian Constitutional Courts derive it from the principle of the rule of law.

While the Croatian Constitutional Court's practice considerably influenced the principle of proportionality as prescribed by the Constitution today,[1107] it frequently eliminates legal provisions for disproportionally restricting human rights and liberties upon proposals filed by individuals and legal persons. In several recent decisions it abrogated provisions containing disproportional administrative sanctions. These, for instance, prescribed the permanent loss of the right of political parties to financial support for their failure to publish financial statements within a predetermined period,[1108] the permanent loss of voting rights of majority shareholders for late applications of acquisitions,[1109] or the permanent loss of driver's licences upon repeated road accidents.[1110]

Also in the recent practice of the Slovene Constitutional Court petitions filed by individuals led to the invalidation of several legal provisions for containing disproportional restrictions. The Court for instance abrogated a provision in the Media Law that determined a term for the right to reply without taking into account the moment in which persons concerned become aware of possible interferences with their rights.[1111] It moreover abrogated a provision that allowed the confiscation of private vehicles used for criminal offences without taking into account the actual ownership.[1112]

Also the Macedonian Constitutional Court eliminated several legal provisions for disproportionally limiting human rights after having received initiatives filed by individuals. It abrogated a provision allowing the confiscation of passports of citizens who have been forcibly returned from other countries after violating rules for entry and residence.[1113] For excessively interfering with the economic freedom of entrepreneurs it moreover abrogated provisions obliging wine makers to annually submit notarially certified confirmations on the fulfilment of their financial obligations,[1114] which prohibited the sale of alcohol

1107 See GARDAŠEVIĆ, 93 ff.

1108 Decision U-I-2986/2013 of 20 December 2013, n. 14, NN 2/14.

1109 Decision U-I-2470/2010 of 9 July 2013, n. 9, see above fn. 628 and decision U-I-4469/2008 et al. of 8 July 2013, n. 24, see above at fn. 656.

1110 Decision U-I-1162/2008 of 28 July 2011, n. 7, NN 77/11.

1111 Decision U-I-95/2009 and Up-419/2009 of 21 October 2010, n. 13, Uradni list 90/10 and OdlUS XIX, 8.

1112 Decision U-I-186/2009 of 28 September 2011, n. 25, see above at fn. 819. See also decision U-I-37/2012 of 8 May 2014, n. 19, see above at fn. 807.

1113 Decision U.br.189/2012 of 25 June 2014, n. 6.

1114 Decision U.br.104/2011 of 16 May 2012, n. 5.

in gas stations at night,[1115] or the sale of tobacco products within a radius of 50 meters from schools and sport facilities.[1116]

B. Principle of equality and prohibition of discrimination

The three Constitutions moreover prescribe the principle of equality and prohibition of discrimination as fundamental constitutional values.[1117] While all three Constitutional Courts abrogated several legal provisions for violating these principles, a significant share of decisions were passed upon popular complaints filed by individuals and legal persons.

Upon the receipt of proposals to initiate judicial review proceedings, the Croatian Constitutional Court for instance abrogated provisions providing more favourable conditions for certain persons when applying for jobs in public administration,[1118] or which only obliged persons entitled to future dividend payments to pay an income tax.[1119] For violating the principle of equality it abrogated provisions prescribing more favourable conditions for the access to education for children of war veterans.[1120] Proposals of individuals also led to the invalidation of legal provisions on unequal treatment and discrimination of national minorities.[1121] Proposals finally induced the Constitutional Court to notify the National Assembly about systematic or habitual cases of inequality or discrimination in legislation. Such discriminations were for instance established with respect to extramarital partners in legislation on social security.[1122]

Despite the rigid requirements to demonstrate a legal interest also the Slovene Constitutional Court invalidated several provisions for violating the principles of equality and prohibition of discrimination upon petitions filed by individuals. It for instance ordered the legislator to reassess pensions for having violated the principle of equality[1123] and abrogated provisions in the Electoral Act

1115 Decision U.br.179/2008 of 8 April 2009, n. 5.
1116 Decision U.br.39/2006 of 6 June 2007, n. 5.
1117 Art. 14 and 15 Cst. Croatia; art. 14 Cst. Slovenia; art. 9 Cst. Macedonia.
1118 Decision U-I-2036/2012 of 21 December 2015, n. 16, see above at fn. 630.
1119 Decision U-I-4763/2012 of 18 September 2012, n. 8, see above at fn. 684.
1120 Decision U-I-4585/2005 of 20 December 2006, n. 6, NN 2/07.
1121 Decision U-I-3597/2010 et al. of 29 July 2011, n. 56, see above at fn. 629; decision U-I-3786/2010 et al. of 29 July 2011, n. 28, NN 93/11.
1122 See notification U-X-1457/2007 of 18 April 2007, NN 43/07.
1123 Decision U-I-239/2014 and Up-1168/2012 of 26 March 2015, Uradni list 30/15.

for not prescribing the accessibility of all polling stations for disabled persons.[1124] Petitioners also succeeded in demonstrating a discriminatory treatment of same-sex couples in inheritance claims.[1125] Prominent are the decisions passed by the Constitutional Court with respect to so-called «erased» persons. After having received numerous petitions by persons concerned, the Court established a discrimination of nationals of other former Yugoslav Republics, who lost their residence permits and were now ordered to leave the country unless they applied for new permits. Their residency rights were removed and their documents and property were taken away after Slovenia gained independence.[1126] Upon the failure of the legislator to introduce the possibility for these persons to restore their unlawfully deprived status, the Court itself ordered the restoration of their status as permanent residents.[1127]

Finally, also initiatives filed to the Macedonian Constitutional Court by individuals and legal persons led to the abrogation of several acts of legislation for violating the principle of equality and the prohibition of discrimination. The Court for instance abrogated a provision in the Restitution Act which excluded the right to compensation for expropriated owners, whose property was declared as cultural or historic object or as a natural rarity.[1128] It also abrogated provisions excluding employees, who terminated their working contracts on their own initiative, from the status of unemployed persons,[1129] and a provision in employment law for violating gender equality because it allowed male workers who reached the ordinary retirement age of 64 to request the prolongation of their employment until 67 while granting the same to women only up to 65 years of age.[1130] Finally, it were petitions which caused the Court to review and abrogate provisions for violating gender equality,[1131] or which

1124 Decision U-I-156/2011 and Up-861/2011 of 10 April 2014, nn. 21 ff., Uradni list 35/14.

1125 Decision U-I-425/2006 of 2 July 2009, n. 14, Uradni list 55/09 and OdlUS XVIII, 29.

1126 Decision U-I-284/1994 of 4 February 1999, nn. 17 f., Uradni list 14/99 and OdlUS VIII, 22.

1127 Decision U-I-246/2002 of 3 April 2003, nn. 30 and 34, see above at fn. 796. In n. 46 of decision U-II-1/2010 of 6 October 2010, Uradni list 50/10 and OdlUS XIX, 11, the Court excluded the possibility to subject the Act prescribing the restoration of the residence permits to a national referendum.

1128 Decision U.br.205/2012 of 25 September 2013, n. 5.

1129 Decision U.br.160/2011 of 29 June 2011, n. 6.

1130 Ruling U.br.114/2014 of 1 April 2015, n. 6.

1131 Decision U.br.83/2010 of 15 September 2010, n. 5; decision U.br.161/2005 of 21 December 2005, n. 5.

privileged officials of the Ministry of Interior with respect to retirement and severance in comparison to other officials and citizens.[1132]

C. Enforcement of individual human rights and liberties

In all three states popular complaints added to the strengthening of the human rights standards by causing the enforcement of individual human rights and liberties against the legislative authorities.

The list of decisions by which the Croatian Constitutional Court abrogated legal provisions for violating constitutionally guaranteed human rights and liberties upon the receipt of proposals is comprehensive. The Court for instance abrogated provisions for violating the freedom of assembly by prohibiting public gatherings within a 100 meter radius from governmental buildings,[1133] or by explicitly determining locations for public assemblies.[1134] Proposals moreover caused the Court to eliminate numerous provisions that violated the constitutionally guaranteed freedom of ownership. This applied to provisions empowering local authorities to offer unused agricultural land in private ownership for rent,[1135] or which prescribed the transfer of possession of cars to the owner of car parks as a guarantee for the payment of parking fees.[1136] Individuals and legal persons also contributed in several instances to the enforcement of economic liberties and social rights against the legislative authorities. They notably caused the abrogation of the general prohibition of Sunday work,[1137] of provisions violating the principle of equal treatment of competitors,[1138] or which limited payments of social contributions in an unconstitutional manner and in violation of social standards of international law.[1139] Proposals finally caused the Constitutional Court to notify the National Assembly about general deficiencies in legislative practice with respect to constitutionally guaranteed rights and liberties. It accordingly notified the

1132 Decision U.br.58/2010 of 29 September 2010, n. 5.
1133 Decision U-I-295/2006 of 6 July 2011, NN 82/11, n. 25.
1134 Decision U-II-242/1998 of 14 April 1999, NN 38/99.
1135 Decision U-I-763/2009 et al. of 30 March 2011, nn. 30 ff., NN 82/11 (English translation available).
1136 Decision U-II-269/2007 of 5 May 2009, n. 7, NN 61/09.
1137 Decision U-I-642/2009 et al. of 19 June 2009, n. 11, NN 76/09; decision U-I-3842/2003 of 28 April 2004, n. 16, NN 55/04.
1138 Decision U-I-1108/2002 of 16 May 2007, n. 8, NN 55/07.
1139 E.g. decision U-I-4170/2004 of 29 September 2010, n. 6, see above at fn. 623; decision U-I-3851/2004 of 12 March 2008, n. 11, NN 37/08.

Assembly about the necessity to adapt the demarcation of electoral districts to the present demographic and social situations in order to guarantee the equality of voting rights in future popular votes and elections,[1140] and about the general lack of remedies for violations of the right to trial within reasonable time.[1141]

The same significance for the protection of the constitutionally guaranteed rights and liberties can be established in Slovenia. Upon initiatives of individuals, the Constitutional Court abrogated provisions of the Civil Procedures Act for violating the constitutional guarantee for fair trial by empowering courts of first instance to reject complaints without considering the merits of the case.[1142] It recently confirmed the responsibility of the legislator to protect the family life for refugees[1143] and abrogated procedural provisions in the International Protection Act that violated the principle of non-refoulement and the right to fair judicial protection for not enabling applicants to justify the continuance of international protection.[1144] Other noteworthy examples are the abrogation of numerous communal regulations which violated the constitutionally guaranteed ownership by categorizing communal roads on private property as public ownership,[1145] or which allowed the confiscation of private vehicles used for criminal offences irrespectively of the actual ownership.[1146] Also the landmark decision on the inconsistency of the introduction of a Tito-street in the Capital Ljubljana with human dignity, in which the Court emphasized the constitutional position of individuals as subjects and not as objects, was caused by petitions submitted by individuals.[1147]

Finally, also several initiatives filed by individuals induced the Macedonian Constitutional Court to eliminate acts of legislation for violating human rights and liberties. The Court for instance abrogated legal provisions that were inconsistent with the right to privacy and to private life because they allowed the secret interception of electronic communication by the authorities,[1148] or

1140 Notification U-X-6472/2010 of 8 December 2010, n. 9, NN 142/10.
1141 Notification U-X-835/2005 of 24 February 2005, n. 3, not published.
1142 Decision U-I-48/2011 and Up-274/2011 of 16 January 2014, n. 18, Uradni list 10/14.
1143 Decision U-I-309/2013 and Up-981/2013 of 14 January 2015, nn. 9 ff., Uradni list 6/15.
1144 Decision U-I-189/2014 and Up-663/2014 of 15 October 2015, nn. 46 f., Uradni list 82/15.
1145 Out of many see decision U-I-305/2012 of 10 July 2014, n. 6, see above at fn. 853; decision U-I-194/2012 of 24 April 2014, n. 8, see above at fn. 807.
1146 Decision U-I-186/2009 of 28 September 2011, n. 25, see above at fn. 819.
1147 Decision U-I-109/2010 of 26 September 2011, n. 19, see above at fn. 800.
1148 Decision U.br.139/2010 of 15 December 2010, n. 6.

the publication of personal data of persons able to provide information about possible crimes and misdemeanours.[1149] Also violations of the secrecy of the ballot[1150] and right to public assembly could be eliminated in this manner,[1151] as well as unconstitutional limitations of the constitutionally guaranteed freedom of ownership. The Court namely abrogated provisions which empowered authorities to assume ownership of illegally constructed buildings,[1152] or which prescribed the transfer of possession on real-estates before the conclusion of expropriation proceedings.[1153] Besides, also fundamental procedural rights and guarantees, such as the presumption of innocence,[1154] or the right to judicial protection could be enforced against the legislator based on initiatives filed with the Constitutional Court.[1155] Initiatives finally led to the abrogation of provisions for violating the right to physical and moral integrity and human dignity by predicating the election of judicial officials on the ethical and moral values that candidates were obliged to disclose.[1156]

2. Enforcement of the rule of law

A. Principle of legal certainty

The principle of legal certainty, which guarantees the clarity, definiteness, consistency, predictability and publicity of laws and other general acts, is acknowledged as precondition of the rule of law in all three states considered.[1157] The case-law of the Constitutional Courts reveals that individuals

1149 Decision U.br.211/2006 of 5 November 2008, n. 5.
1150 Decision U.br.93/2014 of 11 February 2015, n. 5.
1151 E.g. decision U.br.31/2006 of 1 November 2006, n. 7.
1152 Decision U.br.262/2009 of 2 February 2011, n. 5.
1153 See e.g. decision U.br.43/2013 of 4 December 2013, n. 5; decision U.br.125/2012 of 10 July 2013, n. 6.
1154 E.g. decision U.br.125/2014 of 10 July 2015, n. 5; decision U.br.55/2014 of 27 May 2015, n. 6; decision U.br.141/2012 of 10 July 2013, n. 5; decision U.br.206/2011 of 14 November 2012, n. 5.
1155 E.g. decision U.br.51/2010 of 15 December 2010, n. 5.
1156 Decision U.br.156/2012 of 29 February 2012, n. 6; decision U.br.12/2011 of 29 February 2012, n. 5.
1157 See e.g. decision U-I-659/1994 et al. of 15 March 2000, nn. 10 f., see above at fn. 609, of the Croatian Constitutional Court. The Macedonian Court accentuated the same principle in decision U.br.104/2012 of 16 January 2013, n. 6.

played an essential role for the enforcement of this principle against the legislative authorities as well.

During the past twenty-five years the Croatian Court received a great number of proposals which, either explicitly or implicitly, contested laws or regulations for being inconsistent with legal certainty. It consequently eliminated numerous legislative acts for instance for the lack of transitional regulations[1158] or provisions which contained indefinite legal terms or general competences of the state authorities. It emphasized that the failure of the legislator to specify these provisions allowed an arbitrary implementation by the responsible authorities and was therefore inconsistent with the precept of predictability of the legal consequences.[1159] The number of proposals moreover encouraged the Constitutional Court to notify the National Assembly about general shortcomings or systematic and continuous deficiencies in Croatian legislation. Illustrative are its notifications about the unconstitutional yet permanent practice of the legislator to denominate legal acts in a misleading manner with respect to their actual nature. This applies to the described *falsa nominatio* practice, by which the Assembly designates formal laws as «constitutional acts»,[1160] and to its practice to denominate acts amending the Constitution as mere «modifications», rather than as constitutional acts on the amendment of the Constitution.[1161]

Also in Macedonia individuals play a significant role in detecting acts of legislation that are inconsistent with the principle of legal certainty. The Constitutional Court consequently abrogated numerous provisions for containing unspecified and unclear terms, for instance in determining wage calculations for public officials[1162] or the level of procedural fees[1163] or for introducing general competences of state authorities without any further concretization.[1164] Initiatives submitted by individuals moreover enabled the Constitutional Court to detect general deficiencies or inconsistencies in the Macedonian legal order. As a result, it for instance invalidated legal provision that referred to invalid

1158 E.g. decision U-I-7431/2014 of 13 May 2015, n. 28, NN 60/15.

1159 Decision U-I-1988/2011 et al. of 19 June 2012, n. 9, NN 80/12; decision U-I-722/2009 of 6 April 2011, nn. 6 ff., see above at fn. 616.

1160 Notification U-X-838/2012 of 15 February 2012, n. 5, NN 20/12.

1161 Notification U-X-5076/2013 of 15 October 2013, nn. 4 f., NN 20/12.

1162 E.g. ruling U.br.33/2015 of 23 December 2015, n. 5.

1163 E.g. decision U.br.127/2014 of 30 September 2015, n. 5.

1164 See for many decision U.br.63/2013 of 8 October 2014, n. 6; decision U.br.141/2012 of 10 July 2013, n. 5; ruling U.br.71/2011 of 20 March 2013, n. 6.

legal provisions,[1165] or established a general defect in legislation because of the separation of regulations on legal issues into different laws.[1166]

With respect to the role of individuals for the enforcement of the principle of legal certainty, the analysis of the jurisdiction of the Slovene Constitutional Court reveals a different picture. As a consequence of the required personal and direct concern and legal interest, such violations can only be alleged in connection with interferences with the applicant's own rights and freedoms. To the knowledge of the author, the Constitutional Court has not accepted such petitions for consideration so far.

B. Constitutionally prescribed legislative process

In the three states considered the procedures for legislation are prescribed by Constitution.[1167] Essential requirements for the legal validity of laws are their publication in the Official Gazettes, the prescribed period between their publication and their entering into legal force (*vacatio legis*) and the prohibition of retroactivity interdicting the retrospective effect onto legal relations concluded prior to their enactment. The Courts' case-law shows that popular complaints also play a significant role in the detection of violations of these constitutional rules.

Following the receipt of proposals the Croatian Constitutional Court eliminated several laws whose transitional provisions prescribed their entry into force prior to or together with their publication.[1168] The frequency of such decisions caused the Court to reprimand the legislative authorities for the continued violation of the constitutional rules.[1169] After receiving numerous proposals, the Court moreover notified the National Assembly about the unconstitutional practice to delay the legal validity of laws.[1170] The Constitutional

1165 Decision U.br.148/2012 of 23 January 2013, n. 4; decision U.br.212/2010 of 30 March 2011, n. 5.

1166 Decision U.br.55/2012 of 24 April 2013, n. 5; decision U.br.166/2012 of 24 April 2013, n. 7.

1167 Art. 82 ff. Cst. Croatia; art. 89 ff. Cst. Slovenia; art. 69 ff. Cst. Macedonia.

1168 E.g. decision U-II-1303/2005 of 1 March 2011, n. 5; NN 30/11; decision U-II-3982/2006 of 16 February 2010, n. 3, NN 31/10.

1169 Decision U-I-3845/2006 of 23 January 2013, n. 13, NN 12/13.

1170 Notification U-X-80/2005 of 1 June 2006, nn. 3 f., not published.

Court also eliminated several laws and regulations for violating the principle of non-retroactivity.[1171]

A similar significance of individuals and legal persons for the detection of legislative acts that violate the principle of non-retroactivity can be established in Macedonia. Just as its Croatian counterpart, also the Macedonian Constitutional Court for instance eliminated several laws and legal provisions with a retrospective effect following the submittal of initiatives.[1172]

Although also the Slovene Constitutional Court frequently establishes violations of the principle of non-retroactivity, individuals and legal persons play an insignificant role in the detection of such violations. Before its change of practice regarding the required direct concern in 2007, petitioners frequently succeeded in demonstrating a personal concern by alleging retroactive effects of laws.[1173] After the change of practice, however, petitions lost their significance for the enforcement of the principle of non-retroactivity. As a consequence of the obligation to demonstrate a direct interference of a retroactive effect of legal provisions with the personal legal positions, petitions are frequently rejected as inadmissible.[1174] Ever since, the Constitutional Court acknowledged a direct concern of petitioners and abrogated provisions for violating the principle of non-retroactivity in only two cases.[1175]

C. Other guarantees of the rule of law

In all three states considered popular complaints moreover played a significant role in enforcing other fundamental elements or principles of the rule of law against the legislative authorities.

Following the receipt of proposals, the Croatian Constitutional Court eliminated several acts of legislation for violating the principles of constitutionality and legality. It accordingly abrogated not less than 150 articles of the new

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1171 See for many decision U-I-396/2008 of 29 May 2012, n. 3, NN 66/12; decision U-I-1925/2008 of 29 May 2012, n. 4, NN 66/12.

1172 See, e.g., decision U.br.104/2012 of 16 January 2013, n. 5; decision U.br.104/2011 of 16 May 2012, n. 6; decision U.br.118/2011 of 8 February 2012, n. 5.

1173 E.g. decision U-I-178/2000 of 20 March 2003, n. 5, Uradni list 33/03 and OdlUS XII, 18; decision U-I-17/1997 of 23 March 2000, n. 3, Uradni list 35/00 and OdlUS XI, 68.

1174 Out of many see ruling U-I-98/2007 of 12 June 2008, Uradni list 65/08 and OdlUS XVII, 42.

1175 Decision U-I-196/2014 of 5 November 2015, nn. 16, 17 and 34, Uradni list 74/14, 90/15; decision U-I-185/2010 of 2 February 2012, see above at fn. 712.

Criminal Procedures Act,[1176] and a provision introducing an amount in dispute for the right to request revisions before the Supreme Court, which was inconsistent with the Supreme Court's role to ensure the uniform and equal application of laws.[1177] Individuals moreover caused the Constitutional Court to abrogate several regulations violating the principle of legality, such as communal regulations introducing contractual penalties for violations of the parking rules,[1178] to municipal provisions prescribing the compulsory euthanasia of lost pets after five days instead of the thirty day term prescribed by the Veterinary Act,[1179] or to a spatial plan for not having been enacted in the procedure prescribed by the Law on Spatial Planning.[1180]

Also in Macedonia individuals and legal persons play a significant role for the consolidation of the principle of the rule of law. Upon the receipt of initiatives, the Constitutional Court eliminated regulations for violating the separation of powers principle,[1181] the principle of legality,[1182] and the supremacy of the Constitution.[1183] It for instance decided that the legislator violated the principle of constitutionality by only prescribing laws as basis for decision-making of public officials.[1184] Noteworthy is the contribution of individuals to the elimination of the Lustration Laws. Upon the receipt of initiatives the Constitutional Court established violations of fundamental values including democracy, human dignity and the rule of law by the extended time-span for investigations about the collaboration of public officials with the former Socialist secret service to the period after the enactment of the new Constitution in 1991.[1185] After the amendment of the Lustration Law in 2011, the Court was petitioned again to review the compliance of this new act with the Constitution. It established that the extension of the circle of persons subject to lustration processes to retired state officials and to civil persons violated their moral

1176 Decision U-I-448/2009 et al. of 19 July 2012, NN 91/12.
1177 Decision U-I-1569/2004 et al. of 20 December 2006, n. 11 f., see above at fn. 648.
1178 Decision U-II-355/2007 et al. of 10 December 2008, n. 11, NN 148/08 (English translation available).
1179 Decision U-II-3570/2005 of 30 October 2007, n. 7, NN 122/07.
1180 Decision U-II-57/2006 of 25 January 2011, n. 10, NN 18/11.
1181 Decision U.br.66/2014 of 28 January 2015, n. 7.
1182 See e.g. decision U.br.158/2012 of 6 March 2013, n. 4; decision U.br.214/2011 of 4 April 2012, n. 5.
1183 E.g. decision U.br.184/2011 of 15 February 2012, n. 6; decision U.br.202/2008 of 15 April 2009, n. 5.
1184 Ruling U.br.4/2015 of 23 December 2015, n. 4.
1185 Decision U.br.42/2008 and U.br.77/2008 of 24 March 2010, n. 6.

integrity and legal equality,[1186] and that the new temporal limits for lustration processes contradicted to the principles of legal certainty and predictability for the wide circle of persons affected.[1187]

Because of the required demonstration of a personal and direct legal interest and concern, the Slovene petition is considerably less significant for the enforcement of the rule of law. However, as shown, the Constitutional Court acknowledges that the protection exceeds the personal interest of applicants in such cases, where it has difficulties to differentiate between a public and a personal interest of petitioners. Because of the symbolic value of the name Tito, the Constitutional Court accordingly accepted to review all petitions filed against the communal decision to reintroduce a Tito-street in the Capital of Ljubljana.[1188] In a recent decision, the Court moreover abrogated a communal spatial plan for not ensuring public participation in the adoption of new constructional interventions.[1189]

3. Enforcement of democratic rights

Ever since their transition, Croatia, Macedonia and Slovenia commit to popular sovereignty and democratic rule as fundamental governmental principles. The legislative proceedings determined by the Constitutions guarantee the democratic nature of the decision-making processes. The analysis of the case-law reveals that individuals played a significant role also with respect to the detection of acts of legislation which violate the constitutionally guaranteed democratic rights.

To this day, the Croatian Constitutional Court receives numerous proposals to review laws for having been enacted in disregard of the rules for legislation. This particularly applies to laws passed by simple instead of prescribed two-thirds majorities.[1190] The frequency of proposals caused the Constitutional Court to notify the National Assembly about its continuing practice to adopt

1186 Rulings U.br.52/2011 and U.br.76/2011 of 25 January 2012, nn. 7 ff.

1187 Decisions U.br.52/2011 and U.br.76/2011 of 28 March 2012, n. 6.

1188 See above at Chapter 3, p. 146.

1189 Decision U-I-7/2013 and Up-29/2013 of 5 November 2015, n. 13, Uradni list 89/15.

1190 See e.g. decision U-I-5654/2011 of 15 February 2012, nn. 9 ff., see above at fn. 606; decision U-I-292/2011 of 23 March 2011, nn. 6 ff., NN 37/11; decision U-I-2696/2003 of 16 January 2008, nn. 6 f., NN 14/08.

laws in emergency proceedings.[1191] On this occasion, the Court also reprimanded the Assembly for regularly enacting laws in emergency proceedings and for therewith disrupting the very essence of the Croatian Republic as parliamentary democracy. Upon the receipt of proposals the Constitutional Court moreover frequently abrogates acts of legislation adopted without the involvement of the interested public in consultative sessions or popular consultations. The failure of the Minister of Education to prior consultation of parents and parents' associations before adopting the curriculum which included sexual education found great attention in the media.[1192] For the failure of communal councils to include the interested public in procedures of enactment, the Court moreover abrogated numerous construction plans.[1193] It also abrogated provisions obliging political parties to collect «signatures of support» for violating the principle of multiparty systems[1194] and a decision of the National Assembly for violating the constitutionally prescribed guarantee of public proceedings by excluding the public from its sessions.[1195] A recent example finally shows that proposals even contribute to the enforcement of the democratic nature of constitution-making. Following a proposal of an individual filed on the occasion of the current reform proceedings, the Constitutional Court notified the Assembly about the inconsistency of its decision with standards of a democratic and pluralist society by scheduling a public debate before the elaboration of a concrete draft and for the duration of merely six days.[1196]

Individuals also significantly contribute to the enforcement of democratic legislative proceedings in Macedonia. Notable is the comprehensive number of initiatives which induced the invalidation of local urban and spatial plans for having been enacted without an adequate information and consultation of the people concerned.[1197] Initiatives also facilitated the detection of several regulations and other sub-legislative acts adopted in the absence of sufficient legal bases in formal laws.[1198] For not having been enacted as formal laws, the Constitutional Court for instance abrogated contested regulations on the rights and

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1191 Notification U-X-99/2013 of 23 January 2013, nn. 6, 16 ff., NN 12/13.

1192 Decision U-II-1118/2013 of 22 May 2013, n. 12, see above at fn. 592.

1193 E.g. decision U-II-1693/2003 of 22 March 2006, n. 4, NN 43/06; decision U-II-753/2005 of 13 July 2005, n. 7, NN 88/05.

1194 Decision U-I-1397/2015 of 24 September 2015, nn. 86 f., NN 104/15

1195 Decision U-II-1744/2001 of 11 February 2004, n. 6, NN 21/04.

1196 Notification U-X-5730/2013 of 16 November 2013, nn. 5 ff., NN 144/13.

1197 See above at Chapter 3, p. 178.

1198 E.g. decision U.br.124/2011 of 18 September 2012, n. 8; decision U.br.171/2011 of 11 April 2012, n. 6; decision U.br.218/2010 of 9 September 2011, n. 5.

duties of holders of the domain «.mk»,[1199] and regulations adopted by the Judicial Council regulating the criminal responsibility of judges and disciplinary sanctions.[1200] It moreover annulled legal provisions for having been adopted by a simple instead of the required two-thirds majority.[1201] Initiatives of individuals finally played a significant role in enforcing democratic standards by inducing the abrogation of provisions in the Rules of Procedures of the National Assembly that excluded deputies, who were not members of parliamentary groups, from participating in discussions on draft laws in general sessions.[1202]

The Slovene petition, on the other hand, is of a much smaller practical significance for the enforcement of the democratic legislative proceedings. This is the inevitable consequence of the requirement to demonstrate a direct legal interest and the prospect of improvement of the personal status by the abrogation of contested legal provisions. However, after initially denying that disregards of the rules for legislating violate personal legal positions of individuals, the Constitutional Court acknowledges a personal concern of all eligible voters whenever an effective exercise of the right to participate in public decision-making is limited to an unconstitutional extent.[1203] Upon the receipt of petitions, the Constitutional Court accordingly eliminated several acts of legislation enacted in violation of the democratic legislative proceedings. Illustrative is its invalidation of a law that was promulgated and published before the expiry of the term for announcing the collection of signatures for a referendum,[1204] or of provisions facilitating the misuse of personal data of persons who signed referendum requests for preventing the effective exercise of their right to democratic participation.[1205]

1199 Decision U.br.72/2010 of 22 December 2010, n. 5.

1200 Decision U.br.56/2010 of 15 September 2010, n. 5.

1201 Decision U.br.139/2010 of 15 December 2010, n. 7.

1202 E.g. decision U.br.259/2008 of 27 January 2010, n. 5.

1203 See above at Chapter 3, p. 146.

1204 Decision U-I-104/2001 of 18 June 2001, nn. 30 and 42, Uradni list 45/01, 52/01 and OdlUS X, 123.

1205 Decision U-I-217/2002 of 17 February 2005, nn. 10 and 20 ff., Uradni list 24/05 and OdlUS XIV, 6. For other examples, see also decision U-I-67/2009 and Up-316/09 of 24 March 2011, n. 24, Uradni list 28/11 and OdlUS XIX, 19 (English translation available); Decision U-I-76/2014 of 17 April 2014, n. 30, see above at fn. 799.

III. Comparative conclusion

In this Chapter the three popular complaints in Croatia, Slovenia and Macedonia are analysed with respect to their relevance in practice. The first part investigates the significance of these remedies in the practice of the three Constitutional Courts and in relation to their activity. The second part establishes the practical relevance which the popular complaints played and still play for the consolidation of the new constitutional values and principles since the transition of Croatia, Slovenia and Macedonia.

1. Significance in the practice of the Courts

The practical analysis reveals that both judicial review proceedings in general and popular complaints in particular play a secondary role for the activity of the Constitutional Courts in Croatia and in Slovenia. Their main workload is clearly caused by the large amount of constitutional complaints filed. This shows that the principal function of both these Courts in practice is the protection of the constitutional rights and liberties of applicants. The higher practical relevance of constitutional complaints in comparison to the number of popular complaints shows that individuals predominantly seek protection of their rights before the Constitutional Court by means of constitutional complaints.

Popular complaints are only of a secondary significance as remedies for human rights protection. In general, this can be attributed to the higher awareness of interference by acts with an individual and concrete nature. Besides, the persisting perception of the Constitutional Courts as courts of appeal against unfavourable court decisions can be regarded as major cause for the predominance of constitutional complaints in practice. An additional reason in Slovenia in particular is the gradual increase of admissibility hurdles for the submittal of petitions. The high demands as to the immediacy of legal interest as admissibility requirement entailed a steady reduction of the number of petitions filed and, moreover, induced a further decline of their success rate and the amount of admissible petitions.

A different picture is shown with respect to the practical relevance of the right of initiative in Macedonia. The Constitutional Court's main occupation is caused by initiatives filed against laws and other acts of legislation. Constitutional complaints filed against individual state acts, on the other hand, play a

merely secondary role. The same applies to the practical relevance of constitutional complaints as remedies for human rights protection. Predominantly, individuals seek protection of their rights and liberties before the Constitutional Court by filing popular complaints. A probable reason is the limited protective scope of constitutional complaints under current law. While it comprises only a small number of constitutional rights, legal persons are completely excluded from the circle of entitled applicants. This is also reflected by the fact that during its almost twenty-five years long activity, the Court abrogated a contested individual state act only in one single case. The broader protection and the higher chances of success make initiatives more attractive as means to achieve the enforcement of personal rights and liberties by the Constitutional Court. Whether and to what extent the future extension of the protective scope of constitutional complaints will enhance the practical significance of these remedies remains to be seen.

Common to all three states considered is the fact that individual persons are by far the most active applicants in requesting the initiation of judicial review proceedings against laws and other acts of legislation. An essential factor for this predominance of individuals as applicants is the direct or indirect prospect of achieving an improvement of their personal legal position or protection of their own rights and liberties by the invalidation of a contested legal provision. On the other hand, it can be seen as consequence of a certain restraint of state authorities and other authorized applicants towards the political authorities and the legislator.

The practical analysis further reveals a rather low success rate of popular complaints in all three states considered and a high number of rejections and dismissals. Numerous complaints are rejected for the failure to comply with the admissibility requirements such as the jurisdiction of the Constitutional Courts, the formal conditions, and – in Slovenia – the demonstration of a direct and personal legal interest in the initiation of review proceedings. The Constitutional Courts moreover reject a great number of complaints for not calling into question the compatibility of contested provisions with the Constitutions and the laws. Naturally, the low success rate can be attributed to a great extent to the frequent use of these remedies against detrimental or unpopular legal solutions – a risk inherent to unrestricted access of individuals to justice. It can also be explained with the complexity to substantiate inconsistencies of normative acts in an abstract manner and without any reference to concrete legal cases. Finally, it has been shown that the frequent referrals to the lack of competence to review legislative acts and dismissals of complaints for being

unfounded are indicative of a certain judicial self-restraint of the Constitutional Courts towards the legislative authorities.

At this point it is worth to mention the considerably smaller overall workload of the Macedonian Constitutional Court in comparison to its counterparts in Croatia and Slovenia. The number of submittals filed on an annual basis amounts merely to about ten percent in relation to submittals received by the Slovenian Constitutional Court and to even less than three percent of the overall number of submittals filed to the Constitutional Court of Croatia. The fact that its workload appears negligible and is declining even further has been established by the Constitutional Court itself.[1206] Without trying to find an explanation, the author just refers to critics and reports invoking insufficient transparency in relation to the work of the Macedonian Constitutional Court and a lack of independence from the political authorities.[1207]

2. Enforcement of the constitutional guarantees

Despite the rather low success rate of popular complaints in Croatia, Slovenia and Macedonia, it must be acknowledged that these means of direct individual access have had and still have an impact for the enforcement of the constitutional guarantees. The exemplary presentation of decisions from the case-law shows that, in the twenty-five years of activity, the three Constitutional Courts invalidated a vast number of laws and other acts of legislation for violating fundamental rights and democratic guarantees and for being inconsistent with the principles of the rule of law after having received complaints filed by individuals. Consequently it can be said that by means of popular complaints, individual and legal persons have contributed to the consolidation of constitutional guarantees to a significant extent. The more recent decisions of the Constitutional Courts reveal that individuals have an impact in this respect even today. Even if this holds less true for general constitutional guarantees, the Slovene petition still significantly enforces human rights and liberties in Slovenia as well.

1206 See Annual Report 2013, 10 f.

1207 Discussion with Professor Treneska-Deskoska on 4 April 2014. See also Progress Report of the European Commission on Macedonia, pp. 5 f., retrievable over <http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-the-former-yugoslav-republic-of-macedonia-progress-report_en.pdf> and Annual Human Rights Report on Macedonia 2014, pp. 14 f., retrievable over <www.mhc.org.mk/reports/336#> (both links last accessed September 2018).

On the basis of these findings, the following and final Chapter will deal with the question whether the popular complaints can be considered as instruments of an institutional significance for the consolidation of the Constitutions and the therein guaranteed values and rights in Croatia, Slovenia and Macedonia.

Chapter 5: Institutional significance of popular complaints

In literature one can find different views with respect to the expediency and necessity of providing unlimited individual access to constitutional courts. These reflect general opinions about the significance of popular complaints as components of constitutional adjudication from an institutional point of view. This Chapter aims at establishing the actual and concrete institutional significance of popular complaints for the constitutionality in Croatia, Slovenia and Macedonia. After presenting the main arguments for and against such remedies as means of direct individual access to constitutional courts (I), the significance of popular complaints will be established in view of the concrete circumstances given in Croatia, Slovenia and Macedonia (II). At last, previous and current attempts at reform provide an indication on the future prospects of these individual access rights in the three states considered (III).

I. Arguments against and for popular complaints

1. Arguments against providing popular complaints

Among the reasons put forward by opponents of an unlimited individual access to constitutional courts, one can find concerns regarding democratic legitimacy. The legitimacy of an unrestricted entitlement to request the review of laws is questioned because it allows virtually every individual person to attack acts of legislation at any time. Such an enhancement of the number of potential veto players is deemed to result in the permanent challenging of decisions and acts of the democratically legitimated legislative authorities.[1208] Furthermore, a broad accessibility is seen as cause for an increased and more

[1208] See VAN DIJK, 229.

active involvement of the constitutional courts in political processes.[1209] Accordingly, popular complaints are considered to entail a counter-democratic effect.[1210]

A problem that has been thoroughly discussed in relation to the Bavarian popular complaint relates to the classic liberal concept of constitutional states. The idea that individual persons assume the function and role as guardians of the constitutional order in a general interest is inconsistent with the division of roles between the state and citizens according to this concept. Designations as «radical break with the subjective-legal tradition» or «part of the Bavarian curiosity cabinet» indicate a critical attitude in this regard.[1211] This relates to the conflict between the right to submit complaints without any proven individual interest and the classic perception of granting individuals access to courts. Accordingly, legal remedies serve as instruments for the defence of individual rights, the personal sphere and self-development against acts of state authorities.[1212]

Also the Venice Commission in consistent practice advises against introducing an *actio popularis* as means allowing direct individual access to constitutional courts.[1213] On the one hand, the Commission argues that popular complaints would not constitute an effective domestic filter for cases reaching the ECtHR.[1214] Yet, it appears that the Commission primarily bases its position on purely practical considerations. In its Opinion on the Constitutional Law on the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic, it clearly emphasized that

> «[t]he right of appeal should be limited to those persons whose rights have been affected. Otherwise the Chamber might be seriously overburdened with appeals by individuals who complain about any legal act they come to know of.»[1215]

1209 KNEIP, 96; SADURSKI, 8. With respect to administrative judiciary see ERASS, 1370 f.

1210 KNEIP, 98.

1211 MASING, 119 f.; BOHN, 77 ff. See also JELLINEK, 72; NEUGÄRTNER, 5 f., 35.

1212 See MASING, 56.

1213 E.g. Venice Commission Documents CDL-AD(2014)026, n. 87 and CDL-AD(2008)030, n. 51.

1214 See HARUTYUNYAN/NUSSBERGER/PACZOLAY, n. 84.

1215 Venice Commission Documents CDL-AD(2011)018, n. 27 and CDL-AD(2014)020, n. 10.

As arguments against unlimited individual access the Commission accordingly invokes the risk of abusive submittals and an unmanageable amount of applications. As inevitable consequence it refers to the congestion of the courts and an ever growing backlog of unresolved cases. This finally results in an overburdening of constitutional courts to the detriment of their effectiveness and functioning. In this regard the Commission frequently refers to the example of the Croatian proposal.[1216] For the same reasons, the Venice Commission endorsed the abolition of the actio popularis in Hungary.[1217] In this respect it emphasized at several instances that popular complaints in matters of constitutionality neither constitute a European standard nor that their abolition would infringe European constitutional heritage.

This risk of overburdening of constitutional courts as inevitable consequence of unlimited individual access was already recognized by KELSEN.[1218] VAN DIJK finally refers to the great cost burden which results for states from allowing unlimited access to the judiciary.[1219]

2. Arguments in favour of popular complaints

Even though he rejected unlimited individual access for practical reasons, already KELSEN acknowledged that the introduction of popular complaints in judicial review proceedings constitutes the «broadest guarantee of a comprehensive constitutional review».[1220] This statement indicates his recognition of the institutional significance of popular complaints for the enforcement and consolidation of the constitutional order.

Even opponents of popular complaints and the Venice Commission acknowledge their positive effects in states of transition from authoritarian to democratic rule and constitutionalism.[1221] New constitutions are subject to the discretion of the new political powers and exposed to arbitrariness and manipulations especially in the beginning phases. At this stage, the general awareness in politics and in society about the supremacy and significance of the new

1216 E.g. Venice Commission Document CDL-AD(2008)030, n. 51.
1217 Venice Commission Document CDL-AD(2011)001 n. 64.
1218 KELSEN, Staatsgerichtsbarkeit, 74. See also BRUNNER, Festschrift Stern, 1057.
1219 See VAN DIJK, 233 f.
1220 KELSEN, Staatsgerichtsbarkeit, 74.
1221 E.g. BRUNNER, Grundrechtsschutz, 1056; HARUTYUNYAN/NUSSBERGER/PACZOLAY, n. 74.

constitutional guarantees is still insufficient.[1222] In light of these circumstances an unlimited accessibility of constitutional courts to individuals is acknowledged to reinforce the new constitutions and to consolidate the rule of law. The extension of the supervision over acts of legislation to the level of society and the individual person not only facilitates the tracing and elimination of unconstitutional laws and general acts from the legal order.[1223] It is moreover considered to foster the general awareness of society and in politics about the constitution, the fundamental principles and values and the constitutionally guaranteed rights. The important progresses achieved by means of the meanwhile abolished Hungarian *actio popularis* are frequently referred to in this context.[1224]

But also because of their legal effect, popular complaints can be considered to play a significant institutional role. While they can be introduced both as remedies for the enforcement of the objective constitutional order and for individual rights protection, in practice these means are predominantly filed by individuals who seek improvement of their own legal status or protection of their subjective rights. Yet, irrespectively of the motives, the overall protective effect of popular complaints is very strong.[1225] As remedies for the initiation of judicial review proceedings they enforce the constitutional order in an abstract way and with a legal effect which exceeds the subjective interests of the applicants (*erga omnes effect*).

The replacement of the Hungarian *actio popularis* by a normative constitutional complaint in 2011 is considered to have reduced this strong protective effect. Studies on the effects of the restriction of individual access found that the main activity of the Hungarian Constitutional Court has been shifted from abstract to concrete judicial review. As a consequence, its function has changed from a guardian of the constitutionality of legislation to a guardian of individual rights and liberties.[1226] A reduction of protection is moreover recognized due to the simple fact that the requirement of a proven individual interest in bringing proceedings impedes the possibility of filing class actions, for instance by NGO's on behalf of vulnerable groups.[1227]

1222 SMERDEL, Kraj tranzicije, 1 ff. with further details to the transition of Croatia.
1223 E.g. ACHOUR, 397; VAN DIJK, 234.
1224 See e.g. SADURSKI, 6; SOMODY/VISSY, 98.
1225 With respect to judicial review proceedings in general see SOMODY/VISSY, 97.
1226 See KELEMEN, 64, 75 f.; SOMODY/VISSY, 106.
1227 HALMAI, 5; SOMODY/VISSY, 98.

Although less relevant for this study, also other arguments in favour of introducing popular complaints to constitutional courts shall be mentioned at this point. Unrestricted individual access to contest laws is supported by certain scholars as logical consequence of the democratic principle and as a way to compensate deficiencies in democratic systems.[1228] Invoking the contemporary understanding that individual and public interests cannot be strictly differentiated anymore in administrative law, ERRASS advocates for the introduction of popular complaints to administrative judiciary in Switzerland.[1229]

This shows a widespread agreement about the significance of unlimited individual access to constitutional courts and a broad contestability of laws and other general acts of legislation during transition processes. When exactly such processes are completed, must be established for each individual state separately. An institutional significance of popular complaints must consequently be acknowledged also in states where the principles of constitutionality and the rule of law are not *yet* consolidated to a sufficient extent. These states can therefore be considered to still be in the process of transition.[1230]

3. Popular complaints and the rule of law

There is general consent that the existence of an independent institution empowered to monitor the compliance of acts of legislation with the constitutional order constitutes an essential element of the rule of law. The ECtHR considers as basic prerequisite of the rule of law that individual persons are entitled to access courts and to achieve judicial protection. Without specifying the mechanisms and institutions by which the signatory states must ensure the protection of the rights guaranteed by the ECHR, it requires that remedies are effective and accessible and that the proceedings comply with the Convention standards for fair trials.[1231] This holds true for means of judicial protection against state actions that directly interfere with the rights of the applicants.

Only a few scholars consider the unrestricted right of individuals to request the review of laws and other legislative acts as indispensable element of the rule of law. Their arguments are in principle based on the above prescribed

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1228 ACHOUR, 397; ERRASS, 1368.

1229 See the scientific article of ERRASS, 1351 ff., esp. 1372. The correlation between public and individual interests has been described above at Chapter 1, pp. 32 f.

1230 Accordingly also BRUNNER, Zugang des Einzelnen, 235.

1231 See above at Chapter 1, pp. 34 ff.

perception of the adherence to the constitutional order as common good *and* as a personal interest of the applicant as a member of this society. For OTTO PFERSMANN the unlimited access of individuals is a fundamental right of every addressee of a legislative act and a prerequisite for the rule of law.[1232] Slovenian scholar ANDREJ KRISTAN considers the right of individuals to access to constitutional courts without any restriction as one of three dimensions of the rule of law and attempts to limit accessibility, as a restriction of this principle. Based on these findings the author criticizes the continuing attempts to restrict the respective access right in Slovenia.[1233]

The Venice Commission, on the other hand, does not consider these complaints as necessary component of the rule of law. With respect to the abolition of the Hungarian *actio popularis* it stated that

> «[t]he abolition of popular complaints is not problematic from the viewpoint of the rule of law.»[1234]

The small practical significance of popular complaints on the European continent shows that an unrestricted entitlement to request the review of laws can be considered as *feature*, but not as necessity of the rule of law. In most states the entitlement is reserved to authorized state organs or requires a proven individual interest. This finally reflects the predominantly negative attitude towards this remedy in European doctrine and practice, where the disadvantages of an unrestricted accessibility are considered to prevail.

II. In relation to the states considered

The completed accession of Slovenia and Croatia to the EU and the ongoing accession negotiations with Macedonia are indicative for the progress of these states in consolidating democratic rule and the rule of law. In order to establish the actual institutional significance of the popular complaints the following

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1232 PFERSMANN, Prolégomènes, 76 f. In his report to the French Conseil constitutionnel, PFERSMANN, Le recours direct, 1 ff., however recommends the introduction of a subsidiary individual complaint against direct impairments by laws.

1233 KRISTAN, Tri razsežnosti pravne države, 81 f., 87 ff.

1234 See reference in KELEMEN, 76.

will put these remedies in context of the existing political and legal circumstances in the three states considered. This allows a conclusion on their relevance as instruments of constitutional adjudication for the enforcement of the constitutional values and rules. The study does not intend to provide a detailed analysis or portrayal of the political circumstances in these states. Rather, references will be confined to particular aspects in view of which both the review competence of the Constitutional Courts and their accessibility to individuals gain importance.

1. Right of proposal in Croatia

A. Insufficient constitutional awareness

The political elites in Croatia are regularly criticized for their «voluntarism»[1235] or for the general lack of constitutional awareness.[1236] This critique is caused by the frequency of abuses of legislative power for the sole purpose to consolidate political programs. Breaches of constitutional rules can still be established in several instances of recent legislation. Illustrative for a political act that is manifestly inconsistent with the constitutional values and international obligations of Croatia is the Law on Judicial Cooperation in Criminal Matters with EU Member States in June 2013, internationally known as *Lex Perković*. This law has been regarded as means of the Socialist Government to avoid the obligation to surrender former members of the Socialist Secret Service to Germany for the murder of a dissident in Bavaria back in 1983. The restriction was abolished and the accused persons extradited to Germany in 2014 only after the EU threatened to impose sanctions on Croatia for breaching is obligations as EU member state under the European Arrest Warrant.

Furthermore, the Croatian political powers are regularly criticized for their indifference and inability to comply with the constitutionally prescribed proceedings for legislating. Although it denied that Government acted in a manner of unlimited political power, the Constitutional Court raised concerns about its rushed action, by which it prolonged the legal validity of the law

1235 E.g. MATIJEVIĆ, 93 f.

1236 See e.g. SMERDEL, Kriza Ustavnog suda, 4 f.

restricting rights to salary increases per decree on the last day of its legal validity.[1237] The parallel legal validity of two Family Laws as result of inconsistent transitional and final provisions,[1238] and the systematic numerical changes on the occasion of amendments of laws or even the Constitution[1239] are only a few illustrative examples. Finally, the recent impossibility of reaching an interparty agreement for the necessary two-third majority for electing ten Constitutional Court judges is considered as a sign of a growing reluctance of politics to submit to constitutional adjudication.[1240]

This frequency of constitutional breaches by the Croatian political powers is mainly attributed to the five decades of socialist rule.[1241] It is reflected by the regular abuses of the constitution-making power by the political elites for short-term political goals.[1242] The political elites are criticized for considering the Constitution as

> «purely theoretic, symbolically important, yet unpractical and at times even dangerous concept.»[1243]

Illustrative are the rushed through reforms aimed at a rapid accession to the EU, which have been implemented without assessing their compliance with the objectives and values determined by the Constitution.[1244]

Such an insufficient constitutional awareness can be established also in relation to the still prevailing passivity of other state powers in requesting the Constitutional Court to review the compatibility of acts of the legislative power with the Constitution. On the one hand, this restraint is seen as consequence of an insufficient independence from the governing political powers.[1245] The fact that the enforcement of judicial independence from undue political influence constituted an issue for comprehensive judicial reforms up until very recently might explain the restraint of courts in contesting laws and

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1237 Decision U-I-1625/2014 of 30 March 2015, n. 45, see above at fn. 658.

1238 See notification U-X-3239/2014 of 3 July 2014, NN 83/14.

1239 See above at Chapter 2, fn. 342. A detailed analysis is provided by RAČAN, 17. See also MATIJEVIĆ, 93 f.; SMERDEL, Kraj tranzicije, 7.

1240 E.g. SMERDEL, Kriza Ustavnog suda, 6 ff.

1241 SMERDEL, Kraj tranzicije, 3 ff., 7, who provides a more detailed analysis of this reason.

1242 See for intsance SMERDEL, Konstitucionalizam, 101 ff., 104 f.; SMERDEL, Parlamentarni sustav, 99.

1243 SMERDEL, Kraj tranzicije, 6.

1244 SMERDEL, Ustavno uređenje Europske Hrvatske, 599 ff.

1245 This was particularly apparent in Croatia during the presidency of Franjo Tudjman in the beginning years after transition, see for instance PEŠUT, 36 f.

regulations before the Constitutional Court. On the other hand, the insufficient activity of courts in contesting the constitutionality of laws is seen as a consequence of the absence of an explicit obligation to request the review of acts of legislation in connection with pending proceedings.[1246]

B. Institutional significance

Despite the low success rate of proposals filed for the initiation of review proceedings against laws and other general acts, this legal remedy caused the removal of several unconstitutional and unlawful legal provisions during the last twenty-five years. In combination with the Constitutional Court's competence to notify the National Assembly about established inadequacies in legislation, proposals moreover disclosed several serial, systematic or habitual breaches of the Constitution. Even proposals that were rejected for being inadmissible caused the Constitutional Court to issue such notifications.[1247]

Since its reintroduction, the proposal therefore contributed to a significant extent to the enforcement of the constitutional guarantees against the legislative authorities. Without having to proof an individual legal interest, individuals frequently contest laws and other acts of legislation for not complying with fundamental constitutional principles and values to which Croatia committed after its transition. The Croatian proposal thus essentially contributed to the consolidation of the principle of constitutionalism, the rule of law and democratic rule. Moreover, it can be considered to have added and to still add to the protection of fundamental rights offered by the constitutional complaint.[1248] In view of the considerably higher amount of constitutional complaints filed, its role as remedy for individual rights protection is however only subsidiary.

It has been shown that popular complaints are by far not the main cause for the overload of the Croatian Constitutional Court. Yet, it is evident that the unrestricted right of individuals to file proposals increases its workload to a significant extent. As risk inherent to unlimited individual access, it facilitates misuses and the submittal of a great number of proposals against unpopular legal solutions and out of discontent with politics. Illustrative is the submittal of more than 35,000 proposals against the introduction of a special crisis tax in 2009,[1249] or the receipt of more than 1,000 proposals in 2010 filed against

1246 OMEJEC, O potrebnim promjenama, 98 f.
1247 E.g. notification U-X-99/2013 of 23 January 2013, n. 6, see above at fn. 1191.
1248 See to this effect also SMERDEL/SOKOL, 172.
1249 See ruling U-IP-3820/2009 et al. of 17 November 2009, see above at fn. 616.

the reduction of pension payments in order to overcome the financial crisis.[1250] The lack of a requirement of a proven individual interest moreover entailed that the Constitutional Court received more than 700 proposals filed by one individual citizen, who considers himself a guardian of the Constitution against the legislative authorities.[1251] However, the fact that a great number of his proposals lead to the elimination of unconstitutional legal provisions shows that individual citizens like him take over the role to foster and enforce the constitutional order in place of the state authorities pursuant to the separation of powers doctrine.

The persistent disregard of the Constitution by the political authorities shows that constitutional awareness is still insufficient in Croatia. This also applies to the other state organs and especially to those authorized to request the Constitutional Court to initiate judicial review proceedings against unconstitutional acts of legislation. In view of these circumstances, the proposal right must be acknowledged to significantly contribute to the enforcement of the constitutional principles and guarantees against the legislative authorities and for the consolidation of the Constitution of Croatia to this day.

2. The Slovene petition

A. Insufficient implementation of the Court's decisions

The Slovene political powers face less criticism for conscious and notorious violations of the principle of constitutionalism. Yet, also here political elites are blamed for disregarding the authority and supremacy of the Constitution. Such critiques are raised by the Constitutional Court itself. The Court frequently criticizes the legislating bodies for their negligence in implementing its decisions.[1252] In its Annual Report for the year 2015 it criticized the legislator for still not having fully executed its decisions of 1998 and its instruction to mention Roma representatives as members of municipal councils.[1253] The Court emphasizes that with this negligence the legislative powers violate the

1250 See ruling U-I-3610/2010 of 15 December 2010, see above at fn. 1052.

1251 See also LJUBIĆ, Ustavnopravna priroda prijedloga, 8; OMEJEC, O potrebnim promjenama, 88.

1252 The Court repeatedly issues this blame in its Annual Reports. See e.g. Annual Report 2015, 37 ff.; Annual Report 2014, 38 f.; Annual Report 2012, 56 ff.

1253 See Annual Report 2015, 37 and decision U-I-301/1998 of 17 September 1998, Uradni list 67/98 and OdlUS VII, 157.

principle of constitutionality, the rule of law and the separation of powers and are therefore responsible for the high number of applications and for its workload.[1254] The fact that the Constitutional Court repeats this deficiency in each of its Annual Reports shows that this problem persists to this day. Furthermore, the Slovene legislator has been blamed at several instances for abusing its legislative competences to evade judicial review. In relation to its decision on the «erased persons» and the community Ankaran, the Court criticized the legislative authorities for their endeavours to reaffirm their politics by enacting constitutional laws after it declared respective laws as unconstitutional.[1255]

At the same time, also here the state authorities show restraint in using their power as authorized applicants to request the review of acts of legislation by the Constitutional Court. This restraint is attributed to the insufficient independence from the governing political power,[1256] and the absence of an explicit legal obligation to request the review of acts of legislation.[1257] Yet another reason named is a general lack of interest of state organs in requesting the review of legislative acts.[1258] Although in recent years a steady rise of requests filed by courts can be established, individuals remain the main applicants before the Constitutional Court.[1259]

B. Institutional significance

The Slovene petition gains institutional significance in light of these circumstances. Also here, individuals and legal persons caused the elimination of a significant number of unconstitutional laws and other acts of legislation. In the wake of the continued restriction of individual access, abusive submittals could be prevented and the overall number of petitions filed was reduced.

As a consequence of the required legal interest submittals on behalf of third persons and for the enforcement of general constitutional guarantees are excluded. Unless they succeed in proving a direct personal concern, petitions by which applicants contest acts of legislation for violating the principle of the

1254 See for instance its explanations in Annual Report 2002, 12.

1255 For more details see RIBIČIČ, Moč in nemoč ustavnega zakona, 8 ff.

1256 See NERAD, Komentar Ustave art. 162, n. 10, with respect to the Government.

1257 KRIVIC, Ustavno sodišče, 105.

1258 POLAK REMŠKAR, 11.

1259 See foreword of the President of the Constitutional Court to the Annual Report 2013, 5 f. and in more details Annual Report 2013, 41 ff.

rule of law or of other constitutional guarantees will be rejected as inadmissible. Only in a few cases, namely with respect to human dignity, democratic participation and the right to a healthy environment, does the Court apply a wider understanding of the required legal interest.

The actual institutional and protective function of petitions is controversial in Slovene constitutional doctrine and practice. Based on the rigid procedural requirements several scholars endorse a subjective protective function of this access right.[1260] The Constitutional Court, on the other hand, denies such a limited function. In reference to the will of the constitution-makers, it emphasizes that petitions also protect other constitutional guarantees and principles and that not even their procedural dependence from valid constitutional complaints prevents petitioners from alleging violations of other constitutional guarantees and principles.[1261] To the knowledge of the author, the Constitutional Court recognized a legal interest in relation to the violation of such constitutional guarantees only with respect to the principle of non-retroactivity. It justified its finding by emphasizing that also invalidations of provisions for violating the principle of non-retroactivity can be directly decisive for the success of a constitutional complaint.[1262] Furthermore, there is a widespread opinion that neither the constitution-makers by prescribing a legitimate interest as access requirement nor the Constitutional Court with the adoption of a rigid interpretation, aimed at introducing a normative constitutional complaint following the German model. The legitimate interest is rather seen as a «corrective» for the negative aspects of unrestricted accessibility and therefore as means to prevent an excessive use or misuse of the access right.[1263]

In the mentioned decision however, the Constitutional Court accepted the petition for consideration because the petitioner in his constitutional complaint alleged the violation of his right to legal equality by the retroactive application of the contested law.[1264] This shows that in any case applicants cannot demonstrate a direct legal interest without being personally affected in their own rights. This provides ground for the assumption that the Slovene petition was

1260 E.g. KAUČIČ/PAVLIN/BARDUTZKY, 41 f.; OMEJEC, O potrebnim promjenama, 58; ZOBEC, 1093, 1099 f.

1261 Decision U-I-185/2010 and Up-1409/2010 of 2 February 2012, nn. 14 f., above at fn. 712.

1262 Decision U-I-185/2010 and Up-1409/2010 of 2 February 2012, n. 15, above at fn. 712.

1263 KRIVIC, Ustavno sodišče, 119; LUKŠIČ, 734; MAVČIČ, Komentar Ustave art. 24, 175 f.; NERAD, Pravni interes, 43; ŠINKOVEC/TRATAR, 174.

1264 Ruling Up-1409/2010 of 21 December 2010, nn. 3 ff., Uradni list 2/12 and OdlUS XIX, 33.

transformed into a legal remedy for the protection of the subjective rights of petitioners against legislative powers.[1265] This seems to be confirmed by the required necessity of review proceedings for the improvement of the personal legal position. Other indications to this effect are the absence of power of the Constitutional Court to initiate review proceedings at its own discretion and the rigid interpretation of the *dominus litis* position of applicants, as to which review proceedings start and end with the legitimate interest and the validity of their petitions. Another indication is the beginning of the time limits for filing petitions corresponding to the moment of interference with the legal positions or the knowledge of a petitioner about an interference.

Nevertheless, reference to the Slovene petition as mere instrument for individual rights protection does not do justice to its particular nature. On the one hand, the legal effect of the Constitutional Court's decision to invalidate a legal provision for violating constitutional rights exceeds the subjective interest of the applicants. What is more, the circle of applicants entitled to file petitions against laws and acts of legislation with an immediate legal effect comprises also state organs violated in their constitutional position and organizations, who advocate for the protection of the rights of their members or the environment as public good. This shows that the protective function of petitions as remedies does exceed human rights protection.

Due to the fact that petitions are predominantly filed by individuals, their practical significance today is however almost exclusively limited to the enforcement of fundamental rights. In comparison to the constitutional complaint, the relevance of petitions as means of individual rights protection remains subsidiary. This is shown by the considerably larger amount of constitutional complaints received on an annual basis. Over and above, petitions filed by individual persons lose their independent function for being increasingly submitted in connection with constitutional complaints.

Finally, the role of individuals as guardians of the Constitution applies to a significantly smaller extent to the Slovene petition than to its counterpart in Croatia. Just as has been established in Hungary, also here the Constitutional Court's principal practical role seems to have shifted from a guardian of the objective constitutional order to a guardian of constitutional rights of applicants. On the other hand, the institutional significance of the right of petition as remedy for constitutional consolidation can also be considered as smaller in view of the less pronounced disregard of the Constitution by the Slovene

[1265] See to this effect also ZOBEC, 1089, 1092 f.

legislative authorities. This finally holds true in light of the – albeit slowly – increasing activity of authorized state organs to request the review of laws and other acts of legislation before the Constitutional Court.

C. Debate on the effect of restricting individual access

Previous attempts and the current attempts to additionally limit individual access to the Slovene Constitutional Court by vesting it with a discretionary power in accepting complaints for consideration are accompanied by political and legal discourses about effects on the rule of law and democracy. In order to understand the perception of the right of petition among Slovene scholars and in politics, the main arguments raised for and against further restrictions are described in the following.

a) Reinforcement of the rule of law and democratic rule

aa) Increase of efficiency and authority of the Constitutional Court

The most perceptible impact of access restrictions is the reduction of applications filed and, as a result, the decrease in workload. In view of that, even legal scholars who oppose to a restriction of individual access consider the adoption of a more strict interpretation of the access requirements as justified.[1266] The reduction of workload also constitutes the main aim of the Court's claims for a discretionary power to accept appeals for consideration.[1267] The smaller prospect of success is expected to reduce the number of applications filed. In turn, the reduced workload enhances the efficiency of the Court and allows the shortening of the duration of proceedings, ensuring judicial protection in due time.[1268]

Proponents of a discretionary power moreover argue that discretionary decisions allow a positive selection of cases, facilitating the focus on applications which raise questions of fundamental importance for the constitutional order and the protection of the human rights.[1269] This allows the Court to liberate

1266 E.g. MAVČIČ, Individual complaint, 10; NERAD, Pravni interes, 72.

1267 See Annual Report 2009, 2.

1268 Annual Report 2009, 2; KRISTAN, Tri razsežnosti, 66 f. See also statement of deputy CVETKA ZALOKAR ORAŽEM in National Assembly session of 27 October 2010.

1269 E.g. KAUČIČ/PAVLIN/BARDUTZKY, 43; KRIVIC, Upanje in skepsa, 69; RIBIČIČ, Strengthening constitutional democracy, 11 f.

itself from its reputation as instance of appeal and as «litter basket for practically everything»[1270], while reinforcing its authority as supreme guardian of the Constitution.

bb) Responsibility of the judiciary to protect the Constitution

As shown, the Constitutional Court emphasizes that its change of practice in 2007 implemented the primary responsibility of the judiciary to protect the Constitution and fundamental rights.[1271] This measure is supported by several scholars.[1272] The possibility of the Court to base its decisions on the assessments and interpretations of the lower courts is moreover considered to improve the quality of its judgments and of judicial protection in general.[1273]

The introduction of a discretionary power of the Constitutional Court is supported on the basis of similar considerations. The lower prospect of success is deemed to entail a stimulating effect for applicants to seek protection against unconstitutional acts of legislation already before the courts.[1274] Furthermore, a discretionary power of the Court is regarded as indispensable for the realization of its role as supreme guardian of the Constitution, allowing the focus on the protection of fundamental constitutional guarantees, while leaving applications of a merely minor importance to the judiciary.[1275]

cc) Realization of the separation of powers and of democratic rule

Other arguments in favour of restricting the right of individuals to file petitions relate to the institutional strength of the Constitutional Court. Decisive for the Court's strong position are its comprehensive scope of powers and its broad accessibility. These factors are considered to lead to an over dimensioned position which conflicts with the separation of powers and with democratic rule. A restriction of its accessibility is considered as indispensable measure in this

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1270 Statement of deputy CVETKA ZALOKAR ORAŽEM in National Assembly session of 17 March 2011.

1271 See above pp. 148 f.

1272 See e.g. ČEBULJ, Zahteva in pobuda za začetek ustavnosodne presoje, 1481 ff.; GRAD, 7 ff.; RIBIČIČ, Razmerje med ustavno pritožbo in pobudo, 1490 ff.

1273 ČEBULJ, Pravni interes, 95; IBID., Pobuda za ustavnosodno presojo, 1011.

1274 KRIVIC, Ustavno sodišče, fn. 30, 118 f. See to that effect also TESTEN, Zaprta ali le podoljšana pot, 1477, particularly fn. 26.

1275 KAUČIČ/PAVLIN/BARDUTZKY, 43.

regard.[1276] A rigid practice in accepting petitions for consideration is also endorsed from the aspect of democracy. Already in 1995 concerns were raised that low requirements for the acknowledgment of a legal interest implied the risk of a more activist approach of the Constitutional Court in reviewing acts of the legislative authorities. A broad accessibility of individuals was therewith considered as menace for popular sovereignty and as detrimental to the principle of democracy.[1277]

dd) No decrease of standards of judicial protection

Finally, proponents of restrictions of individual access deny that these prevent individuals from directly accessing the Constitutional Court. Following the arguments of the Court they merely defer the right of direct access to the moment when no effective protection can be expected from the judiciary anymore. Rather than preventing its openness, the change of practice ensures the subsidiarity of the Court's protective function.[1278] Given the primary responsibility of the judiciary to protect rights and liberties, the restriction of the entitlement to petition is not considered to decrease the standards of protection.[1279]

b) Weakening of the rule of law and democratic rule

aa) Limiting standards of human rights protection

Already during the first years after transition the Constitutional Court's undifferentiated and rigid practice with respect to a required legal interest of applicants was criticized as incompatible with its role as guardian of human rights. After rejecting petitions against prescribed interceptions of conversations for the purpose of criminal investigations for the lack of a personal legal interest, the hypothetical question was raised whether

1276 See ČEBULJ, Pravni interes, 99.

1277 This tension between constitutional review and democratic rule is explained in detail in BUGARIČ, 43–66 see references in KRIVIC, Ustavno sodišče, 120; CERAR, 337 f.

1278 KAUČIČ/PAVLIN/BARDUTZKY, 45; RIBIČIČ, Razmerje med ustavno pritožbo in pobudo, 1490.

1279 See to that effect TESTEN, Zaprta ali le podaljšana pot, 1477. Critical with respect to this view KRISTAN, Tri razsežnosti, 67.

> «only those [would] be able to submit a petition against the constitutionality of the reintroduction of capital punishment against who such a process has already been initiated?»[1280]

The Constitutional Court was moreover criticized for disregarding its responsibility to provide judicial protection by not taking into consideration the particularities of individual cases. Illustrative is the mentioned rejection of a petition and a constitutional complaint for the sole reason that the applicant reached the prescribed maximum age for election. The Constitutional Court was criticized from its own ranks because

> «[i]t is unacceptable to believe that when a petitioner cannot achieve full satisfaction, he is neither justified to achieve partial [satisfaction].»[1281]

A weakening of the standards of human rights protection is also considered as inevitable consequence of the introduction of a discretionary power of the Constitutional Court.[1282] Opponents invoke the general failure of the judiciary to consider and apply the constitutional guarantees in decision-making.[1283] This negligence is attributed to the reluctance or missing expertise and experience of judges with regard to constitutional law.[1284] For persons whose rights have been violated by a state act, the right of the Court to freely select the cases entails a risk that judicial protection is not ensured before the Constitutional Court either.[1285]

1280 (*Insertion added*). KRIVIC, Ustavno sodišče, 122 f. See also the dissenting opinion of judge MATEVŽ KRIVIC to ruling U-I-89/1995 of 5 October 1995, OdlUS IV, 95.

1281 (*Insertion added*). Dissenting opinion of judge CIRIL RIBIČIČ to ruling U-I-303/2007 of 20 March 2008, nn. 5 ff., see above at fn. 837. As the applicant presumed that his candidacy was rejected based on lustration measures, a declaratory decision of the Court on the violation of his right to stand for election would have – at least partially – improved his legal position in form of satisfaction.

1282 BOŠNJAK, 6 f. See also the arguments raised by deputies FRANCE CUKJATI and BRANKO GRIMS in the session of the National Assembly of 27 October 2010.

1283 See e.g. the arguments of deputy BRANKO GRIMS in the session of the National Assembly held on 27 October 2010. Compare also BOŠNJAK, 8 f.

1284 See BOŠNJAK, 8 f.

1285 Detailed to the consequences of a discretionary power of the Court in BOŠNJAK, 6 ff.

bb) Weakening of constitutionalism and the rule of law

In contrast to the advocates of limited individual access, the opponents consider restrictions of the right of petition to weaken the rule of law by constraining the monitoring power of the Constitutional Court.[1286] The endeavours to reduce the workload of the Constitutional Court by restricting its accessibility are consequently considered to be more harmful to the rule of law than the long duration of the proceedings.[1287]

Besides, the Constitutional Court is blamed for having reduced legal certainty with its change of practice in 2007. Critiques challenge the unclear and inconsistent application of the criteria for a proven legal interest.[1288] On the other hand, the Court's new practice is criticized for not leaving any room to consider the particularities of each individual case and for leading to situations which not only reduce legal certainty but which even harm the confidence and trust in the rule of law.[1289]

Finally, the requirement of a proven legal interest as a means to reduce the Constitutional Court's workload is considered as harmful for the authority of the Court.[1290] Not only for legal scholars, but also for the judges themselves, the Constitutional Court therewith risks damaging its own reputation as guardian of the Constitution and the fundamental rights.[1291] Similar concerns are also raised in relation to the proposed introduction of a discretionary power of the Court in accepting applications for consideration.[1292]

cc) Weakening of democratic standards and popular sovereignty

Opponents of further restrictions of the right of petition moreover invoke detrimental effects for democratic rule in Slovenia.[1293] The right to petition is understood as means of democratic supervision over the adherence of the legislative authorities to the Constitution as expression of the will of the popular

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1286 KRISTAN, Tri razsežnosti, 69 f., 81 ff., 87.
1287 KRISTAN, Tri razsežnosti, 88.
1288 E.g. TESTEN, Komentar Ustave art. 162, n. 21; SLADIČ, fn. 10; ZOBEC, 1096 ff.
1289 ZOBEC, 1094 f.
1290 E.g. SLADIČ, 21 f.; NERAD, Pravni interes, 72 f.
1291 See CIRIL RIBIČIČ in dissenting opinion to ruling U-I-303/2007 of 20 March 2008, nn. 1 f., see above at fn. 837.
1292 BOŠNJAK, 6 f.; MAVČIČ, Slovene constitutional review, 88.
1293 KRISTAN, Tri razsežnosti, 69; MAVČIČ, Individual complaint, 23 f.

sovereign. A broad democratic supervision requires a broad access of individuals. Thus, restrictions of the right of individuals to petition weaken democratic supervision over the legislator and of democratic rule as a whole. The introduction of a discretionary power is therefore considered to inevitably lead to a deterioration of democratic standards in Slovenia.[1294]

3. The Macedonian right of initiative

A. Absence of political pluralism

Critiques for the inability or reluctance of political authorities to act in compliance with and within the frames determined by the Constitution can be found in Macedonia as well. These are triggered by the frequent adoption of laws and other acts of legislation which violate the constitutional guarantees either by content or by the proceedings in which they were enacted. The political powers are held responsible for the persistent inability to fulfil the fundamental elements of the rule of law.[1295] Only one recent and illustrative example is the adoption of the Media Act, which enabled censorship and the extension of government control and therewith considerably curbed the freedom of media and of speech.[1296]

The frequent violations of fundamental constitutional principles are also attributed to the dominance of the Government over the Macedonian National Assembly and the judiciary.[1297] Given that governmental proposals are adopted by the governing majority without any critical appraisal or real political debate, the political decision-making is in fact exclusively conducted by the governing powers. This dominance is reinforced by the frequent boycotts of the political opposition to attend the Assembly sessions. In 2008 such a boycott enabled the governing coalition to adopt not less than 168 laws in

1294 Argument of deputy FRANCE CUKJATI in the session of the National Assembly held on 17 March 2011.

1295 A detailed analysis in this respect is provided by TRENESKA-DESKOSKA, Constitutionalism, 18. Instead of the rule of law, the author speaks of the «rule of man» in Macedonia.

1296 See article published on <http://www.balkaninsight.com/en/article/macedonian-journalists-shun-minister-over-media-law> (last accessed September 2018).

1297 See Bertelsmann Transformation Index (BTI) Country report for Macedonia 2016, p. 10 f. available on <http://www.bti-project.org/fileadmin/files/BTI/Downloads/Reports/2016/pdf/BTI_2016_Macedonia.pdf> (last accessed September 2018).

emergency proceedings during one single month.[1298] Rather than an expression of democratic rule and popular sovereignty, the Macedonian National Assembly is considered to have become a «cemetery of democracy».[1299]

This dominance of the Government is also considered as major reason for the reluctance of the other state authorities to contest acts of legislation before the Constitutional Court.[1300]

B. Institutional significance

Just as its counterparts in Croatia and Slovenia also the Macedonian initiative contributed to the elimination of unconstitutional laws and other acts of legislation to a considerable extent. During the last twenty-five years initiatives filed by individuals and legal persons played the most significant role in the enforcement of the constitutional standards against the legislative authorities.

Just as the Croatian proposal the initiative was re-established with the primary function to enable individuals to contribute to the enforcement of the constitutional guarantees and values. The analysis of the jurisdiction reveals that initiatives are predominantly filed for the own benefit and for the protection of the personal rights. In contrast to its Croatian counterpart however, the initiative plays a primary role as legal remedy for individual rights protection. The protection offered by initiatives is considerably more extensive than the one offered by constitutional complaints. According to one view, this access right only offers an indirect or «concurrent» protection of the subjective rights of the applicants.[1301] Following another opinion, initiatives are considered as remedies for subjective rights protection and «compensatory legal means» for the limited protection offered by constitutional complaints. This view is shared by the Constitutional Court who stated that

> «through the traditional form of *actio popularis*, this [abstract review] becomes a matter of public interest, although these initiatives contain the real individual interest of the citizens or other subjects. Thus, the abstract control is a means of realization of a *direct* protection of human freedoms and

1298 The majority of these acts are still valid today, see KRČINSKI, fn. 2. Although these acts were contested by an initiative for violating the legislative procedures, the Constitutional Court stopped the review proceedings after the petitioner deceased.

1299 TRENESKA-DESKOSKA, Parliament, 18.

1300 Discussion with Professor TRENESKA-DESKOSKA on 4 April 2014. With respect to the lack of judicial independence, see TRENESKA-DESKOSKA, Judicial Independence, 13 ff.

1301 E.g. KALKAŠLIEVA, 80; SKARIĆ, 410.

rights, which *compensate* the limited competence of the Court in direct realization of this protection.»[1302]

This is a consequence of the extensive protective effect of initiatives, which – in contrast to constitutional complaints – not only serve the protection of all fundamental rights but also enforce these rights against the legislative authorities as institutions guaranteed by constitutional law in a public interest.[1303] This view seems to be confirmed by the notable difference in the amount of initiatives and constitutional complaints filed. The statistical data show that the latter – in contrast to the Croatian and Slovenian complaints – only play an insignificant role for individual rights protection.

Irrespectively of the primary motivation to file initiatives, individuals and legal persons contributed to the protection and enforcement of fundamental rights against the legislative authorities. Moreover, initiatives effectuated the elimination of several provisions for violating fundamental values of the rule of law, other constitutional provisions or democratic standards guaranteed by the Constitution. Consequently, these remedies significantly contribute to the consolidation of these principles and values in Macedonia as well.

At the same time and just as in Croatia, the detrimental effects of unrestricted individual access prove to be true in Macedonia as well. Although the Macedonian Court can hardly be considered as overburdened, a significant number of initiatives is filed out of discontent and with the aim to achieve the elimination of legal solutions deemed to be unfavourable or adverse to the own legal position. Besides, individual citizens are encouraged to assume the self-declared role of guardians of the Constitution also here. Just as in Croatia one certain petitioner files initiatives for the initiation of review proceedings on a regular basis.[1304] The fact that not a few of his initiatives caused the elimination of unconstitutional or unlawful acts of legislation speaks for the positive effect of unrestricted individual access on the enforcement of the Constitution also in Macedonia.

The institutional significance of the initiative finally becomes evident in light of the persistent disregard of the Constitution by the political powers and the restraint of the state powers to contest laws and other acts of legislation. The

1302 (*Insertions and Italics added*). Constitutional Court of the Republic of Macedonia, 46 f. This opinion is shared by ČOBANOV, fn. 908; IVANOVSKI/JANJIĆ-TODOROVA, 7.

1303 See IVANOVSKI/JANJIĆ-TODOROVA, 8 f.

1304 See ČOBANOV, fn. 1194.

statistical data reveal that, just as in Croatia and Slovenia, individuals and legal persons are by far the most active applicants in contesting laws and other general acts of the legislative authorities. The significance of unlimited individual access is invoked also in view of the lack of boldness of the Constitutional Court to use its own extensive competences to ensure the enforcement of the Constitution against the legislative authorities. In view of these circumstances, a broad accessibility of the Constitutional Court must be considered as desirable.[1305] The institutional significance of the initiative finally seems to be acknowledged by the Constitutional Court itself. In relation to initiatives filed by individuals and legal persons, it accordingly states that constitutional review is the

> «real indicator of enforcement of the Constitution in the judicial practice».[1306]

III. Future prospects of the popular complaints

1. Right of proposal in Croatia

A. Unsuccessful attempt at restriction in 2001

An attempt to limit individual access to the Croatian Constitutional Court by means of the proposal was made on the occasion of the reform of the constitutional judiciary in 2001. The proposal aimed at restricting the right to propose the review of acts of legislation by introducing the requirement of a proven individual interest. With the Slovene right to petition in mind, the proponents suggested that applicants demonstrate a direct interference of contested provisions with their legal position when submitting proposals.[1307] The idea to introduce a new procedural requirement did, however, not find any support in the Assembly and was deleted from the final proposal on the amendment of the CCL.[1308]

1305 See discussion with Professor TRENESKA-DESKOSKA on 4 April 2014.

1306 See the Report of the Constitutional Court for the XII[nd] Conference on European Constitutional Courts, see above at fn. 554, 4 f.

1307 E.g. CRNIĆ, Pokretanje postupka, 3.

1308 See Report of the Croatian National Assembly (IHS) no. 312 of 16 November 2001, 38.

Therewith, the responsible commission showed that it was not willing to restrict the accessibility of the Constitutional Court to individuals and other legal subjects. It stated that the introduction of legal interest as procedural requirement would

> «curtail the level of the constitutional rights of the applicants reached so far.»[1309]

It further held that this new requirement would be incompatible with the constitutionally guaranteed right to file petitions and complaints to state organs and to receive a reply. Finally, the commission argued that it would be incompatible with the nature of proposals and their primary objective to request the review of laws and not to protect rights and liberties. The suggestion to introduce legal interest as admissibility requirement for proposals was also rejected by several deputies in the National Assembly.[1310]

As other proposal to limit individual access and to improve the national budget, the introduction of court fees was discussed on the occasion of the said reform as well. Yet, also this proposal was deleted by the National Assembly in order to not restrict the access to wealthy applicants only.[1311]

B. Existing demands to restrict the right of proposal

The available statistical data reveal that the Croatian Constitutional Court is heavily overburdened. The reason is not only the excessive number of applications received year after year, but also the consequential backlog of unresolved cases.[1312] Amongst legal scholars one can observe a general consensus on the necessity of comprehensive constitutional and legal reforms. The Constitutional Court itself regularly invokes the indispensability of reforms so as to reduce its workload and to improve its efficiency.[1313] Suggestions on how to avert an excessive number of new applications in the future are made by the

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1309 See explanation of the National Assembly on the proposal to enact the constitutional act to amend the CCL no. 291 of 11 June 2001. A reference to the respective decision can be found in KRAPAC, Pretpostavke za pokretanje i vođenje, 200.

1310 The statements made in the session of the Assembly are published in Report IHS no. 305 of 26 July 2001, 34 and 38.

1311 See also Report HIS no. 305 of 26 July 2001, 33 f., 38 and 40.

1312 E.g. OMEJEC, O potrebnim promjenama, 45.

1313 See e.g. Strategic plan for the period 2014–2016, 4, available in Croatian language on the Court's website <http://www.usud.hr> (last accessed September 2016).

judges of the Constitutional Court themselves. These comprise the introduction of its power to reject obviously unfounded applications.[1314] Yet, the key demand remains the introduction of the legal interest as procedural requirement for individual access.[1315] The above mentioned rejection of the National Assembly to introduce this procedural requirement has been criticized by the Court members.[1316] These consider its refusal to adopt an unpopular measure such as the restriction of existing rights as politically motivated.[1317]

A comprehensive reform of the access system is consequently considered as only solution. In principle, suggestions aim at restricting the right to request the initiation of judicial review proceedings to state organs, while replacing the entitlement of individuals to file proposals with a «multi-functional» constitutional complaint along the lines of the German normative constitutional complaint or the Slovene petition.[1318] This measure is considered to reduce the number of applications received annually, especially because individuals would first have to exhaust all available legal remedies before accessing the Constitutional Court.[1319] These proposals correspond to the transformed Hungarian normative constitutional complaint.

C. Outlook on the future of the right of proposal

Constitutional reforms conducted so far did not include any changes to the accessibility of the Constitutional Court. In fact, such changes have not even been discussed on the occasion of these reforms. Neither today there seem to be any concrete efforts on the part of the political power to overcome the institutional problem related to the overburdening of the Constitutional Court. As already indicated, new proceedings of constitutional reform have been initiated recently upon a respective proposal filed in July 2013 by a group of representatives in the National Assembly.[1320] Yet, the only suggestion relating

1314 LJUBIĆ, Karakter prijedloga, 811.

1315 Judge DAVOR KRAPAC expressed this view in KRAPAC, Pretpostavke za pokretanje i vođenje, 200 f., 204 and KRAPAC, Postupak pred Ustavnim sudom, n. 26.2.

1316 KRAPAC, Pretpostavke za pokretanje i vođenje, 200 and fn. 78.

1317 Discussion with Secretary General of the Croatian Constitutional Court TEODOR ANTIĆ of 4 July 2013.

1318 For a detailed presentation of this proposal of the Court see OMEJEC, O potrebnim promjenama, 124 and figure no. 5.

1319 See OMEJEC, O potrebnim promjenama, 114 ff.

1320 The decision of the National Assembly to initiate proceedings for constitutional review was passed on 25 October 2013, NN 131/13 and the decision of the Assembly on the

to constitutional judiciary discussed concerns the Court's competence to confirm the constitutionality of referendum questions.

There are no signs that the right of proposal as means of individual access to the Croatian Constitutional Court will be restricted or abrogated in the near future. The recent reform proceedings show that the chronic overburdening of the Constitutional Court does not belong to the issues on the current political agenda. Mostly, this agenda seems to be fully dominated by the attempts to form and maintain a governing coalition. Therefore, it seems rather improbable that suggestions to restrict the Court's accessibility will be made on the part of the political actors any time soon. Rather, such a request has to come from the Constitutional Court itself. But again, a respective request is likely to have difficulties to reach the two-thirds majority necessary for constitutional amendments. Restrictions of rights constitute unpopular political measures. Secondly, an adoption of such a proposal in the near future seems unlikely because of the strong contrasting political positions within the Croatian National Assembly. In relation to the current constitutional reform proceedings, heavy political polemics and mutual accusations arose in connection with about every single proposal discussed. Despite a speedy initiation, the process of constitutional reform has therefore not advanced any further since December 2013.

This raises the question whether the Constitutional Court itself could restrict the right to propose the initiation of judicial review proceedings by adopting a more strict interpretation of the admissibility criteria? As shown, the Court has taken such an action by increasing the demands for substantiation for filing constitutional complaints.[1321] Yet, the explicit wording of art. 38 para. 1 CCL, which guarantees the right to propose the initiation of review proceedings against laws and other general acts to every individual or legal person, prevents the Constitutional Court from limiting its accessibility on its own initiative. The adoption of a more rigid interpretation of the entitlement to file proposals is therefore rather improbable without respective constitutional reforms.

In the light of the above, it can be concluded that individual access granted by the right of proposal in accordance to the existing law in Croatia will not be restricted in the near future.

Adoption of the Draft Changes to the Constitution on 13 December 2013, NN 150/13, see above at fn. 345.

1321 See above at Chapter 2, pp. 87 f.

2. Right of petition in Slovenia

A. The petition as subject-matter of several reforms

During the past twenty-five years the right of individuals to petition for the initiation of review proceedings against laws and other general acts has been subject to continuous limitations. After the restriction by the constitution-makers in 1991, demands for further restrictions were raised in 2000. These have been complied with in 2007 with the adoption of the new CCA and, particularly, with the change of practice by the Constitutional Court itself. Despite the slight decline in the amount of petitions following these reforms, demands for further restrictions of individual access continue to persist in legal doctrine, practice and in politics. There is widespread agreement that the previous measures did not suffice and that the possibilities to unburden the Court by means of legal changes and a more rigid interpretation are exhausted. Comprehensive reforms of the competences and the accessibility of the Constitutional Court are generally considered as only remaining measures.[1322]

Different proposals on how to reduce the workload of the Court can be found. The Constitutional Court suggested the reduction of its powers already in 2000. It suggested the transfer of those powers to the administrative courts that are inherent to the judiciary, namely the competence to resolve jurisdictional disputes and to review the legality of governmental and other sub-legislative acts.[1323] So as to reduce the number of applications filed, other reform proposals suggest the introduction of mandatory legal representation,[1324] or the imposition of court fees.[1325] Another suggestion, finally, includes the elimination of the Court's obligation to justify every decision to accept or to reject petitions.[1326]

Yet, additional restrictions of individual access to the Constitutional Court are at the core of the debates on further reforms. The parallel ways of access by means of constitutional complaints and petitions is seen as main cause for its overload. The Constitutional Court itself considers the parallel existence of

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1322 E.g. ČEBULJ, Pobuda za ustavnosodno presojo, 1006; RIBIČIČ, Razmerje med ustavno pritožbo in pobudo, 1488 f. See also Constitutional Court in Annual Report 2008, 29 ff.

1323 Annual Report 2000, 12; Annual Report 2005, 17.

1324 RIBIČIČ, Razmerje med ustavno pritožbo in pobudo, 1493.

1325 MAVČIČ, Zakon o Ustavnem sodišču, 298; RIBIČIČ, Razmerje med ustavno pritožbo in pobudo, 1493.

1326 POLAK REMŠKAR, 12.

these access rights as unnecessary and as detrimental.[1327] Unlike the constitutional complaint, the petition encounters scepticism already for a long time. While its initial value is undisputed, it is claimed that its institutional significance has been superseded with the introduction of the constitutional complaint.[1328]

a) Proposals to restrict individual access

Among the proposals on how to reduce the workload of the Constitutional Court are suggestions to eliminate the right of petitions. The Constitutional Court itself questioned the need of such an entitlement of individuals in addition to the broad circle of qualified applicants and in view of the possibility to incidental judicial review in connection with constitutional complaints.[1329] The elimination of petitions finds supporters among legal scholars as well.[1330]

More frequent are proposals to vest the Constitutional Court with a discretionary power in accepting applications for consideration. The practice of the US Supreme Court to grant *certiorari* and to freely select which applications to assess on the merits serves as role model for these proposals.[1331] The power of the Constitutional Court to decide only on applications that raise questions of real constitutional importance would reduce its workload to a considerable extent. Also the Constitutional Court itself criticized its obligation to assess every single submittal in order not to violate the applicants' rights.[1332] On the occasion of the constitutional reform proceedings initiated in 2009 it therefore submitted a motion to introduce its discretionary power in accepting applications for consideration.[1333] This motion found support among political powers and several legal scholars.[1334]

1327 Annual Report 2006, 3.

1328 See KRIVIC, Ustavno sodišče, 69 f., 103 and 118 f.

1329 Annual Report 2005, 18.

1330 GRAD, 9; ČEBULJ, Zahteva in pobuda za začetek ustavnosodne presoje, 1482.

1331 See above p. 14. Detailed explanations are provided by KRIVIC, Ustavno sodišče, 122 ff.

1332 Annual Report 2001, 11.

1333 Annual Report 2009, 2.

1334 E.g. KAUČIČ/PAVLIN/BARDUTZKY, 38 f., 41 f.; RIBIČIČ, Strengthening constitutional democracy, 11 f.; TESTEN, Zaprta ali le podoljšana pot, 1477.

b) Governmental proposal for constitutional reform

The calls of the Constitutional Court for reforms were included into the legislative program of the Slovene Government for the year 2009. An essential impulse for the beginning of concrete discourses was given by the speech of former President of the Republic Danilo Türk held before Parliament.[1335] Therein, he emphasized the indispensability of reforms for the reduction of the workload of the Constitutional Court and for an efficient protection of the Constitution and the fundamental rights. Only a few months later, the Government submitted a proposal to initiate proceedings for constitutional reform in relation to art. 160, 161, and 162.[1336] The Government suggested a restriction of the circle of applicants authorized to request the initiation of review proceedings and the exhaustive enumeration of the Court's competences. Its most radical proposal related to the Court's accessibility. Following the motion of the Constitutional Court, the Government proposed the introduction of the Court's competence to freely select which applications to accept for consideration.

The governmental proposal was supported and complemented by the expert group convened by the Constitutional Commission. The expert group proposed the definition of two criteria as basis for the Court's discretion in order to ensure the predictability and to prevent arbitrary decisions.[1337] Firstly, the Court should always take into account the significance of the constitutional issue at stake. Secondly, it should always consider the severity of the consequences for the applicant.

In spite of the widespread approval about the indispensability of comprehensive reforms the governmental proposal was not adopted. First, it did not reach the approval of two-thirds of the Commission in the sessions held in October 2010 and on 17 March 2011. For the same reason, the proposal was rejected by the National Assembly on 16 June 2011. Thereafter, the governmental proposal was removed from the agenda. The records of the proceedings reveal

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1335 Former President Türk held his speech on the 38th session of the National Assembly on 24 April 2008.

1336 Proposal of the Government of the Republic of Slovenia of 21 July 2009 for the initiation of proceedings for the amendment of the Constitution of the Republic of Slovenia and draft of the constitutional law, EVA 2009-2011-0037.

1337 See explanations of expert group member IGOR KAVČIČ to the opinion of the expert group of 18 October 2010, which was discussed in the session of the National Assembly of 27 October 2010.

that the proposed discretionary power of the Constitutional Court was a key issue in the political debates and the main reason for the failure of the proposal. This is indicative of a prevalent reservation against further restrictions of individual access.[1338]

B. Outlook on the future of the petition in Slovenia

In contrast to its Croatian counterpart, the Slovene Court has proven an activist approach in increasing the demands for its accessibility to individuals within the frame given by the Constitution and the CCA. As shown, it considerably restricted the right of individuals to file petitions with the adoption of a rigid interpretation of the legal interest already before the enactment of the CCA in 1994 and with its change of practice in 2007. This change of practice was a reaction to the failure of the Government to respond to its motions on the occasion of the enactment of the new CCA.[1339] Besides the restrictions achieved, the impulse to further restrict individual access by introducing a discretionary power has always been given by the Court itself. Its motions were adopted in the governmental programs and proposals for reform of the system of constitutional adjudication.

However, it must be taken into account that the governmental proposal for constitutional reform of 2009 failed for not reaching the required two-thirds majority. The arguments expressed by the opponents to the proposal and in legal doctrine reveal a reservation against further restrictions of individual access and the right to petition. Concerns about a possible deterioration of the standards of the rule of law, democratic rule and human rights protection seem to prevail. Against these backgrounds it is difficult to predict the future of the right of petition against laws and regulations. An indication for future restrictions could be the continuous demands of the Constitutional Court to alleviate its chronic overburdening and the fact that the two-thirds majority was only missed for seven votes. It has even been claimed that, in case of the failure of further reform attempts, the Constitutional Court should introduce its discretionary power itself by a change of practice.[1340] Such a far-reaching step is however rather improbable without an amendment of art. 162 para. 2 Constitution which guarantees the right of everyone with a legal interest to access the Constitutional Court.

1338 See also KAUČIČ/PAVLIN/BARDUTZKY, 46.

1339 See ČEBULJ, Pobuda za ustavnosodno presojo, 1006 f.

1340 RIBIČIČ, Strengthening constitutional democracy, fn. 31.

3. Right to submit initiatives in Macedonia

A. No previous attempts at restricting individual access

As shown, the Macedonian Constitution has been revised in seven reforms and by 32 amendments since its enactment in 1991. Yet, none of these changes related to the jurisdiction or the accessibility of the Constitutional Court. Only the reform in the wake of the ratification of the Ohrid Framework Agreement, which ended the violent inter-ethnical conflict in 2001 affected constitutional judiciary to a limited extent, by introducing a quorum for approval of elections of Constitutional Court judges by deputies representing ethnic minorities.[1341] A later attempt of the Government to revise the normative basis for constitutional adjudication on the occasion of the comprehensive judicial reform in 2005 in relation to the accession negotiations with the EU was not included into the draft amendment adopted on 7 December 2005.[1342] Since the enactment of the Constitution in 1991 the broad accessibility of the Macedonian Constitutional Court has consequently never been challenged or changed – neither by constitutional reform nor by amendment of the Rules of Procedure by the Court itself.

B. No existing demands to restrict individual access

As has been shown, the regulatory autonomy of the Constitutional Court with regard to its organization and proceedings constitutes a focal point of legal discourses already for several years.[1343]

In contrast, there are hardly any demands in Macedonia to restrict the accessibility of the Constitutional Court and to limit the access of individuals and legal persons. Critics against the practically unlimited entitlement to file initiatives are only raised by individual scholars. Proposing the introduction of a legal interest as procedural requirement,[1344] these efforts comply with the suggestions made by the Constitutional Court of Croatia. Unrestricted access of

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1341 Constitutional amendment XV of 16 November 2001, Služben vesnik 91/01.

1342 Decision of the National Assembly of 7 December 2005 on the proclamation of the amendments XX–XXX, Služben vesnik 107/05. The governmental proposal to adopt a respective law was criticized by the Venice Commission for merely relating to the decision-making power, but not to the proceedings of the Constitutional Court, see Venice Commission Document CDL(2005)66, n. 66.

1343 See above at Chapter 2, pp. 68 f.

1344 ČOBANOV, 50, 237 f.

individuals is regarded as inconsistent with the objective of individual access to protect fundamental rights. In view of the power of the Constitutional Court to initiate such proceedings at its own discretion and in view of the circle of other applicants authorized to file respective requests, the initiative is considered as superfluous and as cause for the workload of the Constitutional Court.[1345]

However, there is no political or legal discourse on the necessity to restrict the Constitutional Court's accessibility in general or to individuals and legal person at all. The workload resulting from the approximately 200 applications received per year shows that the Macedonian Court does not nearly suffer from a comparable overload as its counterparts in Croatia and Slovenia. Consequently, there also appears to be no need for measures to decrease its workload or to limit its accessibility.

C. Outlook on the future of the Macedonian initiative

a) No subject in current constitutional reform proceedings

In June 2014 the Macedonian Government submitted a proposal for constitutional reform to the National Assembly.[1346] The eight amendments suggested therein aim at the fulfilment of the admission requirements for the aspired access to the EU and become legally effective in 2017. Besides the improvement of the financial system and the strengthening of the independence of the judiciary, two proposals suggest the extension of the powers of the Constitutional Court. One of them relates to the introduction of a complaint against decisions of the Judicial Council in relation to the election of candidates.

More relevant for the present study is the proposal to extend the Court's powers in protecting fundamental rights. In reference to the restricted scope of protection offered by constitutional complaints, the Government proposes the introduction of a complaint that strengthens the standard of human rights and liberties. The protection should not only entitle applicants to contest all individual acts and actions of bearers of state and of local authorities. It should moreover be extended to constitutional rights and liberties which cannot be protected by constitutional complaints under the existing law. In addition to

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1345 ČOBANOV, 50. The author even suggests the abolition of the initiative as means of individual access to the Constitutional Court.

1346 The proposal was presented by the Minister of Justice in the session of the National Assembly on 16 July 2014.

those rights already protected under the valid Constitution, the Government specifically enumerates political rights, the right to life, the right to liberty, the prohibition of torture, the presumption of innocence and the right to fair trial.[1347] In its opinion on the proposed amendments to the Macedonian Constitution, the Venice Commission endorses the extension of the scope of protection.[1348] It however criticizes the explicit enumeration of the protected rights and liberties in the governmental proposal and the failure to list other fundamental rights such as the guarantee of ownership or the right to strike.[1349]

All deputies attending the debate held in the National Assembly advocated for the extension of the Constitutional Court's power in protecting human rights and liberties.[1350] In the subsequent vote, the governmental proposal reached the required two-thirds majority of the National Assembly. It was adopted despite objections of Albanian deputies for not containing any proposal to improve the minority rights of ethnic Albanians and despite the absence of the Albanian opposition party who since the early elections held in April 2014 boycotts the Assembly, accusing it of electoral fraud.[1351] Although the Government maintained the exhaustively enumerated list of rights and liberties protected by means of the constitutional complaint, in the draft amendments elaborated thereupon, it extended it in accordance to the opinion of the Venice Commission. Following the recommendations of the Commission, it furthermore included into its proposal the amendment of the Constitution and the adoption of a law by a two-thirds majority on the mode of operation and procedures of the Constitutional Court. The elaborated draft amendments were finally confirmed by the National Assembly in its session held on 23 January 2015.

b) Outlook

Besides these recent endeavours to extend the protection of human rights and liberties, no demands with respect to a restriction of the broad accessibility of

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1347 See page 3 of the Minutes of the session of the National Assembly of 16 July 2014.

1348 Opinion on the Seven Amendments to the Constitution of the Former Yugoslav Republic of Macedonia, Venice Commission Document CDL-AD(2014)026, nn. 78 ff.

1349 Venice Commission Document CDL-AD(2014)026, n. 83.

1350 See hereto the different votes made during the session held by the National Assembly on 16 July 2014.

1351 See e.g. article of 17 July 2014, retrievable on <http://www.balkaninsight.com/en/article/macedonia-gives-nod-to-constitutional-changes> (last accessed September 2018).

the Macedonian Constitutional Court are made. Accordingly, it can be concluded that the right of individuals to file initiatives against acts of legislation has been and is principally undisputed in Macedonia. Therewith the situation in Macedonia considerably differs from Croatia and, in particular, from Slovenia. Not even the Macedonian Constitutional Court has shown any endeavour to restrict the practically unrestricted individual access by making use of its regulatory autonomy or by requesting respective constitutional reforms.

It is probable that the primary role of initiatives as means of direct individual access to the Constitutional Court changes as consequence of the adoption of the constitutional amendments by the National Assembly. In the long run, the extension of the protection by means of constitutional complaints could induce a considerable increase in the number of applications filed, which, finally, leads to demands to limit the Court's accessibility to individuals. As can be observed in Croatia and Slovenia, not the constitutional complaints, which cause the major workload, but the popular complaints became the focal point of proposals for reform to restrict individual access to the Constitutional Court. Whether this prediction will effectively come true with respect to the Macedonian initiative will however only become evident once the respective constitutional amendment enter into force in 2017.

IV. Comparative conclusion

This Chapter aims at establishing the institutional significance of popular complaints as means of individual access to constitutional courts and as remedies against laws and other acts of legislation. Despite diverging opinions in doctrine and practice, the question can be answered only by taking into consideration the particularities and concrete circumstances in each individual state. The study takes as connecting factors persistent deficiencies in implementing the Constitutions both by political authorities and by other state authorities. These are not only indicative of the status of transformation but eventually also for determining the institutional significance of the complaints provided in Croatia, Slovenia and Macedonia.

A comparable answer can be given with respect to Croatia and Macedonia, where the entitlement of individuals to file popular complaints is not restricted by the requirement of a proven individual interest. The amount of complaints rejected for being inadmissible or dismissed for being unfounded confirms the

invoked risks of misuses and of a great number of submittals out of mere dissatisfaction with political decisions.

However, the main argument of the Venice Commission that unrestricted individual access inevitably leads to a congestion of constitutional courts cannot be fully confirmed. On the one hand, the practical analysis shows that popular complaints are by far not the main reasons for the workload of the two Courts. As consequence of its perception as court of appeal, the Croatian Constitutional Court suffers much more from the amount of constitutional complaints. And the relevant data in Macedonia reveals that popular complaints cannot be considered as cause for overloading the Constitutional Court either. Over and above, it is probable that the initiative will lose practical significance after the extension of protection by constitutional complaints. On the other hand, the fact that certain individuals are prompted to take the self-declared role as guardian of the constitution cannot per se be considered as a negative factor of unrestricted individual access. The examples given in both states show that appeals of these persons have in fact resulted in the invalidation of not a few unconstitutional laws and other acts of legislation.

Fundamental deficiencies in implementing the Constitutions exist in Croatia and in Macedonia both on the part of the political authorities and on the part of other state organs authorized to request the initiation of review proceedings. These deficiencies indicate that the process of transition from the formerly authoritarian systems to constitutional democracies has not yet been completed. In light of the generally acknowledged positive effects of unrestricted individual access to constitutional courts in periods of transition it can therefore be concluded that both the right of individuals to propose the initiation of review proceedings in Croatia and the right of submitting initiatives for judicial review in Macedonia still play a significant role for the consolidation of the new constitutional values. In response to the question raised in this Chapter, these means of direct individual access to the Constitutional Courts constitute essential features of constitutional adjudication from an institutional point of view.

A somewhat different conclusion must be drawn with respect to the right of individuals to file petitions against laws and other acts of legislation to the Constitutional Court of Slovenia. The continued endeavours to restrict individual access show that the concerns of the Venice Commission with respect to unlimited individual access are shared. Today access is limited to individuals who are directly affected by unconstitutional laws and who can demon-

strate a prospect of improvement of their rights by the invalidation of the contested act of legislation. From the perspective of individuals, the formerly unrestricted access right under socialist rule has de facto been converted to another remedy for individual rights protection before the Constitutional Court. With regard to constitutional complaints, petitions are only of a subsidiary relevance in practice.

Consequently, individuals in Slovenia play a less essential role as guardians of the Constitution as has been established with respect to Croatia and Macedonia. Also in light of the more advanced progress of Slovenia in transition, the petition must be considered to be of smaller institutional significance. Over and above, it seems that the significance of this means of direct individual access is diminishing both from a practical and an institutional point of view. While on an annual basis the Constitutional Court receives a considerably larger amount of constitutional complaints, it has been shown that petitions lose their independent function for being more and more submitted in connection with constitutional complaints.

It remains to be seen whether direct individual access to the Slovene Constitutional Court will be additionally restricted by introducing a discretionary power of the Court in taking submittals into consideration. The recent unsuccessful attempt at introducing this additional access hurdle shows that concerns about the effect of such a restriction on the rule of law and the standards of human rights protection prevail in politics.

Concluding observations

After the dissolution of the SFRY the newly independent states Croatia, Slovenia and Macedonia re-established their Constitutional Courts and re-introduced popular complaints as means of direct individual access to these Courts. Due to their particular nature, such popular complaints fundamentally differ from other legal remedies in public and constitutional law proceedings. As remedies for the initiation of judicial review proceedings they serve the enforcement of the abstract constitutional order against the legislative authorities. As individual access rights they, at the same time, entail features of legal remedies for the protection of subjective rights. Therewith, these three states distinguish themselves from most other European states with concentrated constitutional adjudication, where, as a consequence of their original function to enforce the constitutional order against the legislator in an objective sense, the entitlement to request the initiation of judicial review proceedings is principally restricted to state organs.

In light of that the study analyses the popular complaints in Croatia, Slovenia and Macedonia from a procedural point of view and in a practical aspect. These findings allow the drawing of conclusions about the significance of these means of direct individual access for the systems of constitutional adjudication in the three states and as instruments for the enforcement of the Constitutions against the political authorities.

The procedural analysis shows several resemblances: All three states allow the filing of popular complaints against a comprehensive scope of legislative acts. Applicants filing popular complaints must fulfil a number of requirements as to the form and content of complaints. Complaints are only accepted for consideration if they are substantiated to such an extent that raises doubts with respect to the compatibility of a challenged law with the Constitutions. Resemblances also exist with respect to the arrangement of the judicial review proceedings. Applicants are vested with information rights and can be invited to participate and to therewith influence the decision-making of the Constitutional Courts. This inclusion of applicants in accordance to the Convention standards for fair trials shows a broader understanding of the nature of judicial review proceedings. In all three states finally, applicants can achieve concrete personal benefits from the review and the invalidation of unconstitutional laws.

As most essential difference the right to file petitions against acts of legislation to the Slovene Constitutional Court is additionally restricted by the requirement of a proven legal interest. Applicants must demonstrate an immediate legal impact of a contested law or legal provision on their legal status or rights. Additionally, they must show that the invalidation of the contested provision improves their personal legal positions. In most cases they only succeed in doing so by additionally submitting a valid constitutional complaint against individual acts passed in application of the contested law.

On the basis of the concrete procedural arrangements, it can be stated that the popular complaints in Croatia and Macedonia serve both as remedies for subjective rights protection and as instruments for the enforcement of the abstract constitutional order against the legislative authorities. The protective function of the Slovene petition is less clear. From the perspective of individuals, the requirements as to their legal interest de facto restricted the function to the protection of their subjective rights.

The analysis of the popular complaints from a practical point of view reveals their significance in relation to constitutional complaints in practice. In Croatia and Slovenia popular complaints only play a secondary role as remedies for individual rights protection, whereas constitutional complaints are of a far greater importance. In contrast, the initiative in Macedonia is of a considerably greater practical relevance as remedy for subjective rights protection. The limited protective effect of constitutional complaints must be seen as reason for this reverse picture. Whether and to what extent the ongoing reform will enhance the practical significance of constitutional complaints to the detriment of popular complaints remains to be seen. The analysis from a practical point of view further reveals that, in relation to requests submitted by the authorized applicants, individuals and legal persons are by far more active as applicants requesting the Constitutional Courts to review laws and other acts of legislation.

In all three states, popular complaints have a generally low success rate before the Constitutional Courts. Failures to comply with the procedural requirements and to call into question the compatibility of contested legal provisions with the Constitutions are frequent reasons for their rejection and dismissal. To a great extent this can be attributed to the frequent use of these remedies against unpopular legal solutions. But also the difficulty to substantiate inconsistencies between normative acts in an abstract manner can be seen as reason. The high requirements for substantiation are also indicative of a restraining approach of the Constitutional Courts. At the same time however, the analysis

of the case-law reveals that not a few laws and acts of legislation have in fact been reviewed and abrogated on the basis of popular complaints during the twenty-five years since transition. This shows that, despite their low success rate in relation to their amount filed, the popular complaints in Croatia, Slovenia and Macedonia have added and still add to the enforcement of human rights and constitutional guarantees such as the rule of law and democratic rule to a significant extent.

Irrespective of whether the proposals, petitions or initiatives are filed for the protection of the personal rights of applicants or against violations of other constitutional guarantees, the far-reaching protective effect of these remedies must be emphasized. Successful complaints cause the invalidation of unconstitutional laws and legal provisions and therewith enforce the respective rights, guarantees or principles as constitutional institutions. The protective effect consequently exceeds the subjective interests of applicants and enforces the Constitutions in a general interest of society.

As has been shown, there is general agreement that broad individual access to constitutional adjudication entails a positive and promoting effect for the consolidation of constitutions in states of transition. A high activity of individuals in requesting the constitutional courts to review laws and other acts of legislation with respect to their compatibility with the constitutions is essential in view of the absence of an active and efficient mutual control between the state powers. Yet, the attitude towards granting individuals unrestricted access to constitutional courts prevails in Europe. This attitude is predominantly based on practical considerations comprising the risk of abusive submittals and a high cost burden as consequence of unrestricted individual access. Besides, the Venice Commission regularly advises against the introduction of popular complaints by referral to the overburdening of the Croatian Constitutional Court.

However, in consideration of the actual and concrete circumstances in the three states considered, these doubts and reservations appear unfounded and unjustified. Firstly, by receiving about 200 complaints on an annual basis, the Macedonian Court cannot really be considered as overburdened. In Croatia and Slovenia, on the other hand, the main reason for the congestion of the Constitutional Courts is the amount of constitutional complaints while popular complaints only constitute a small fraction of the submittals received. Secondly, it has been shown that in all three states the political powers regularly neglect the Constitutions when legislating. Laws are enacted in disregard of constitutional standards and guarantees or of the prescribed procedures for

legislating. Constitutional and legal reforms are initiated for political purposes and constitutional powers abused to circumvent judicial review. The amount of decisions by which the Constitutional Courts invalidate laws and other acts of legislation indicates a persisting lack of awareness and consolidation of the Constitutions. What is more, the analysis reveals that, rather than using their powers to checks and balances, the state organs authorized and the judiciary in particular show restraint with the use of their power to request the Constitutional Courts to review laws and other acts of the legislative authorities.

In light of these circumstances, the institutional significance of remedies allowing individuals to access the Constitutional Courts in order to achieve the initiation of review proceedings increases considerably. Given the insufficient constitutional awareness among political authorities, this is all the more true with respect to Macedonia and Croatia, where individuals can file popular complaints without a proven individual interest.

Because of the chronic overload of their Courts, the negative attitude towards popular complaints has, to a certain extent, found proponents in Croatia, Slovenia and Macedonia as well. For the time being, however, Croatia and Macedonia seem to adhere to their popular complaints and Slovenia to hesitate to limit individual access even further. On the one hand, these states have a tradition of unlimited individual access to constitutional adjudication already for more than fifty years. To a certain extent, a lack of courage or political strategy to not restrict any rights of individuals can be seen as other reason. Finally, it seems to be the acknowledgment of the institutional significance of popular complaints for the consolidation of the Constitutions which keeps these three states from restricting individual access by means of popular complaints. At this place, it can be referred to the concerns raised by a number of scholars in the wake of the replacement of the Hungarian *actio popularis* by a normative constitutional complaint in 2011. The therewith caused shift from the Court's main activity from abstract to concrete judicial review is considered to have reduced the strong protection offered by the Constitutional Court. Alarming is the fact that this reform was accompanied by several other measures which aimed at reducing the Constitutional Court's competences and constitutional adjudication as a whole.

To conclude it can be stated that the transition to constitutionalism, to the rule of law and to democratic rule in Croatia and Macedonia, and to a certain extent also in Slovenia, is not yet concluded and still continues today. In view of that, the popular complaints can be regarded as institutional premises for the further enforcement of the Constitutions and human rights in these states. As the first

President of the Croatian Constitutional Court, JADRANKO CRNIĆ declared, with the entitlement to access the Constitutional Court by constitutional complaint and by proposal, individuals were intended to assume the role of guarantors of the Constitution.[1352] In light of the above, it can be concluded that this statement has not lost its validity even twenty-five years after transition of these states from socialist rule.

[1352] CRNIĆ, Komentar Ustavnog zakona, 26; IBID., Pokretanje postupka, 3.

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